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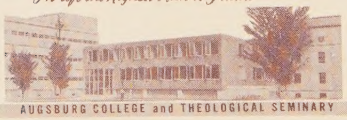

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THE

CONSTITUTIONAL HISTORY

OF THE

UNITED STATES

BY
FRANCIS NEWTON THORPE

IN THREE VOLUMES
1765-1895

VOLUME THREE
1861–1895

CHICAGO
CALLAGHAN & COMPANY
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I hold that, in contemplation of universal law and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever—it being impossible to destroy it except by some action not provided for in the instrument itself.

Abraham Lincoln, First Inaugural Address,
March 4, 1861.

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BOOK V.

EMANCIPATION.

MAP OF
UNITED STATES
SHOWING EXTENT OF THE
SOUTHERN CONFEDERACY
1861

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES.

CHAPTER I.

EMANCIPATION INAUGURATED AS A CIVIL POLICY BY THE STATES AND AS A MILITARY POLICY BY THE NATIONAL GOVERNMENT.

While the amendment to make slavery national and perpetual was on its way through Congress, the plan for a slaveholding Confederacy had been carried into effect. The cotton States, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas and Florida, had practically perfected a federal organization before the election of Lincoln and had made provision for representation in a Confederate Congress within a month of his inauguration. The slave-holding States north and west of South Carolina, including Arkansas and Missouri, were less aggressive in secession than the cotton States. In Tennessee, Virginia, North Carolina and Arkansas, public sentiment was divided. The majority of the people were opposed to secession, but their political leaders were successful in bringing them into the Confederacy, though not without great labor and political craft. The people of the border States, Missouri, Kentucky, Maryland and Delaware, were not friendly to secession, and repeated attempts to unite them with the Confederacy failed. In the terrible struggle that followed, Tennessee, Kentucky and

Virginia became the chief battleground of the civil war. The effort of the Confederacy to secure the border States was continuous, until its hopelessness was demonstrated by the devotion of the loyal people and the successes of the national armies.

The causes which induced, and as South Carolina asserted, justified, secession from the Union, were set forth in the Declaration and the Address of the people of that State, which have been given in the preceding chapter. These utterances can be accepted as official notice to the whole world of the nature, the principles and the purposes of the Southern Confederacy. The subject of which these two Declarations made complaint was the heterogeneity of interests, both industrial and political, among the States. The Confederacy moulded its declaration of independence on the Jeffersonian form of 1776, but substituted "the Union" for "King George." But were the interests of the slaveholding States so identical as to insure perpetuity to the new league? President Lincoln answered this fateful question in his first inaugural. "Plainly," said he, "the central idea of secession is the essence of anarchy."[1] A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, could be the only true sovereign of a free people. Whoever rejected it, of necessity flew to anarchy, or to despotism. Unanimity was impossible; the rule of a minority, as a permanent arrangement, wholly inadmissible, so that, rejecting the majority principle, anarchy or despotism in some form was all that was left.

The President did not forget the position assumed by many, that constitutional questions were to be decided by

[1] Mr. Lincoln's language is closely followed throughout this presentation of the national idea.

the Supreme Court; nor did he deny that such decisions must be binding, in any case upon the parties to a suit, as to the object of that suit, while they were also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it was obviously possible that such decisions might be erroneous, in any given case, still the evil effect following it, being limited to that particular case, with the chance that it might be overruled and never become a precedent for other cases, could better be borne than the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government, upon vital questions affecting the whole people, was to be irrevocably fixed by decisions of the Supreme Court, the instant they were made, in ordinary litigation between parties in personal actions, the people would have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor was there, in this view, any assault upon the court, or the judges. It was a duty from which they could not shrink—to decide cases properly brought before them; and it was no fault of theirs, if others sought to turn their decisions to political purposes.

One section of our country believed slavery was right, and ought to be extended, while the other believed it was wrong, and ought not to be extended. This was the only substantial dispute. The fugitive slave clause of the Constitution, and the law for the suppression of the foreign slave-trade, were each as well enforced, perhaps, as any law could ever be, in a community where the moral sense of the people imperfectly supported the law itself. The great body of the people kept the dry legal obligation in both cases, and a few broke over in each. This, he thought, could not be perfectly cured, and it would be worse in both

cases after the separation of the sections than before. The foreign slave-trade, then imperfectly suppressed, would be ultimately revived, without restriction, in one section, while fugitive slaves, then only partially surrendered, would not be surrendered at all by the other.

Physically speaking, the people could not separate. They could not remove the North and the South from each other, nor build an impassable wall between them. A husband and wife might be divorced, and go out of the presence and beyond the reach of each other; but the different parts of our country could not do this. They must remain face to face, and intercourse, either amicable or hostile, must continue between them. Was it possible, then, to make that intercourse more advantageous or more satisfactory after separation than before? Could aliens make treaties easier than friends could make laws? Could treaties be more faithfully enforced between aliens than laws among friends? Suppose North and South went to war; they could not fight always; and when, after much loss on both sides, and no gain on either, they ceased fighting, the identical old questions as to terms of intercourse would arise.

"This country, with its institutions, belongs to the people who inhabit it. Whenever they grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."[1]

But Lincoln went further than merely to uncloak the central idea of secession; he gave utterance, more completely than it had ever been given before, to the idea of nationality founded upon industrial freedom. The issue, said he, in his message convening Congress in special session, on the fourth of July, expressed more than the fate

[1] Lincoln's Works, II, 5-6.

of the United States. It represented to the whole family of man the question whether a constitutional republic, or democracy—a government of the people, by the same people—could or could not maintain its territorial integrity against its own domestic foes. It presented the question whether discontented individuals, too few in numbers to control administration according to organic law in any case, could always, upon the pretenses made in the case of South Carolina, or upon any other pretenses, or arbitrarily without any pretense, break up their government, and thus practically put an end to free government upon the earth. It compelled the question: "Is there in all republics this inherent and fatal weakness?" "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"

Viewing the issue in this light, the President had no choice but to call out the war power of the government, and to resist force, employed for its destruction, with force employed for its preservation.

"It might seem, at first thought," said Mr. Lincoln, "to be of little difference whether the movement at the South was called 'secession' or 'rebellion.' The movers, however, well understand the difference. At the beginning they knew they could never raise their treason to any respectable magnitude by any name which implied violation of the law. They knew that their people possessed as much moral sense, as much devotion to law and order, and as much pride in the history of the government of their common country, and reverence for it, as any other civilized and patriotic people. They knew they could make no advancement directly in the teeth of these strong and noble sentiments. Accordingly, they commenced by an insidious debauching of the public mind. They in-

vented an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union. The sophism itself was that any State of the Union may consistently with the National Constitution, and therefore lawfully and peacefully, withdraw from the Union without the consent of the Union, or of any other State. The little disguise, that the supposed right was to be exercised only for just cause, themselves to be the sole judges of its justice, was too thin to merit any notice.

"With rebellion thus sugar-coated, they had been drugging the public mind of their section for more than thirty years, until at length they had brought many good men, who could have been brought to no such thing before, to a willingness to take up arms against the Government, the day after the Southern conventions had enacted the farcical pretense of taking their States out of the Union.

"This sophism derived much, perhaps the whole of its currency, from the assumption that there was some omnipotent and sacred supremacy pertaining to a State—to each State of the Federal Union. The States have neither more nor less power than that reserved to them in the Union by the Constitution—no one of them ever having been a State out of the Union. The original ones passed into the Union even before they cast off their British colonial dependence; and each of the new ones came into the Union directly from a condition of dependence, excepting Texas, and even Texas, in its temporary independence, was never designated a State. The new ones only took the designation of States, on coming into the Union, while that name was first adopted by the old ones, in and by the Declaration of Independence, which declared the 'United Colonies' to be 'free and independent States.' Even then the object plainly was not to declare

their independence of one another or of the Union, but directly the contrary; as their mutual pledge and their mutual action before, at the time, and afterward, abundantly showed. The express plighting of faith by each and all of the original thirteen, in the Articles of Confederation, two years later, that the Union should be perpetual, was most conclusive.

"Having never been States either in substance or in name outside of the Union, whence then this magical omnipotence of 'State Rights,' asserting a claim of power to lawfully destroy the Union itself? Much had been said about the 'sovereignty' of the States; but even the word, said the President, was not in the National Constitution, nor, as he believed, in any of the State constitutions.[1] In the political sense of the term it would not be far wrong to define sovereignty as 'a political community without a political superior.' By this test no one of the States except Texas ever was a sovereignty. 'And even Texas gave up the character on coming into the Union; by which act she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be for her the supreme law of the land.' The States have their status in the Union, and no other legal status. They can break from this, only against the law, and by revolution. The Union, not the States themselves, separately, procured their independence and their liberty. By conquest or purchase, the Union had given each of them whatever of independence or liberty it promised. 'The Union is older than any of the States, and, in fact, it created them as States. Originally some independent colonies made the Union, and, in turn, the Union threw off their old dependence for

[1] For the use of the word in the State Constitutions, see Vol. I, pp. 169-173.

them, and made them States, such as they are. Not one of them ever had a State's constitution independent of the Union. Of course, it is not forgotten that all the new States framed their constitutions before they entered the Union—nevertheless, dependent upon and preparatory to coming into the Union.'

"Unquestionably, the States have the powers and rights reserved to them in and by the National Constitution; but among these surely are not included all conceivable powers, however mischievous or destructive, but, at most, such only as were known in the world at the time as governmental powers; and certainly a power to destroy the government itself had never been known as a governmental, as a merely administrative power. Thus relative matter of national power and State rights, as principle, is no other than the principle of generality and locality. Whatever concerns the whole should be confided to the whole—to the General Government; while whatever concerns the State should be left exclusively to the State." This embodies all there is of original principle in State rights. Whether the National Constitution in defining boundaries between the two has applied the principle with exact accuracy, could not be questioned. All were bound by that definition.

Lincoln combated the position that secession was consistent with the Constitution:—was lawful and peaceful. No one had contended that there was any express law for it; and nothing can be implied as law, which leads to unjust or absurd consequences. The Nation purchased with money the countries out of which several of the States were formed. Was it just that they should go off without leave and without refunding? The Nation paid very large sums (in the aggregate, nearly a hundred millions) to relieve Florida of the aboriginal tribes. Was it just that

this State should now be off without consent or without making any return? The Nation was in debt for money applied to the benefit of these so-called seceding States, in common with the rest. Was it just either that creditors should go unpaid or the remaining States pay the whole? A part of the national debt in 1860 was contracted to pay the old debts of Texas. Was it just that she should leave and pay no part of this herself?

If one State could secede, so might another; and when all had seceded, none would be left to pay the debts. Was this quite just to creditors? Did the American people give notice of this sage view when they borrowed the money? If the Nation recognized this doctrine by allowing the seceders to go in peace, it was difficult to see what it could do if others chose to go or to extort terms upon which they would promise to remain.

The seceders insisted that the Constitution admitted of secession. They had assumed to make a national constitution of their own, in which of necessity they either discarded or retained the right of secession as they insisted it existed in the old one. If they discarded it, they thereby admitted that on principle it ought not to be in the old one. If they retained it, by their own construction of the old one, they showed that, to be consistent, they must secede from one another whenever secession might be found to be the easiest way of settling their debts, or effecting any other selfish or unjust object. The principle itself was one of disintegration, and upon which no government could possibly endure.

If all the States, save one, should assert the power to drive that one out of the Union, Mr. Lincoln presumed the whole class of secession politicians would at once deny the power and denounce the act as the greatest outrage upon State rights. But if precisely the same act, instead

of being called "driving the one out," should be called "the seceding of the others from that one," it would be exactly what the seceders claimed to do, unless, indeed, they made the point that the one, because it was a minority, might rightfully do what the others, because they were a majority, might not rightfully do. These politicians were subtile and profound on the rights of minorities. They were not partial to that power which made the Constitution and speaks from the preamble calling itself "We, the People."

The President questioned whether in 1861 there was a majority of the legal qualified voters of any State, except perhaps South Carolina, in favor of disunion. There was much reason to believe that the Union men were the majority in many, if not in every other one of the so-called seceding States. The contrary had not been demonstrated in any one of them. He ventured to affirm this true even of Virginia and Tennessee; for the result of an election held in military camps, where the bayonets were all on one side of the question voted upon, could scarcely be considered as a demonstration of popular sentiment. At such an election, all that large class who were at once for the Union, but against coercion would be coerced to vote against the Union.

It might be affirmed, he said, without extravagance, that our free institutions had developed the powers and improved the condition of our whole people beyond any example in the world. Of this there was a striking and an impressive illustration. So large an army as the government had on foot in 1861, every soldier in it having taken his place of his own free choice, was never before known. But more than this, there were many single regiments whose members, one and another, possessed full practical knowledge of all the arts, sciences, professions, and what-

ever else, whether useful or elegant, is known in the world; and there was scarcely one from which there could not be selected a President, a Cabinet, a Congress, and perhaps, a Court, abundantly competent to administer the Government itself. Nor did he deny this to be true also of the army of the Confederacy. If true, so much better the reason why the Government which had conferred such benefits on both North and South should not be broken up. Whoever, in any section, proposed to abandon such a government would do well to consider, in deference to principle, what better he was likely to get in its stead,—whether the substitute would give, or was intended to give, so much of good to the people? There were some foreshadowings on this subject. The people of the South had adopted some declarations of independence in which, unlike the good old one, penned by Jefferson, they omitted the words "all men are created equal." They had adopted a temporary national constitution, in the preamble of which, unlike that of the old one, signed by Washington, they omitted "We, the People," and substituted "We, the deputies of the sovereign and independent States." Why this deliberate pressing out of view the rights of men and the authority of the people?

It was essentially a people's contest. On the side of the Union it was a struggle "for maintaining in the world that form and substance of government whose leading object is to elevate the condition of men—to lift artificial weights from all shoulders; to clear the paths of laudable pursuits for all; to afford all an unfettered start, and a fair chance in the race of life. Yielding to partial and temporary departures, from necessity, this is the leading object of the government for whose existence we contend.

Lincoln believed that the plain people understood and appreciated this. It was worthy of note that while in the

government's hour of trial, large numbers of those in the army and navy, who had been favored with offices, had resigned and proved false to the hand which had pampered them, not one common soldier or common sailor was known to have deserted his flag. To the last man, so far as known, they successfully resisted the traitorous efforts of those whose commands, but an hour before, they had obeyed as absolute law. This was the patriotic instinct of the plain people. They understood, without an argument, that the destruction of the government made by Washington meant no good to them.

Popular government in America had often been called an experiment. Two points in it our people had already settled—its successful establishment and successful administration. One still remained—its successful maintenance against a formidable internal attempt to overthrow it. The time had come for them to demonstrate to the world "that those who can fairly carry an election, can also suppress a rebellion; that ballots are the rightful and peaceful successors of bullets; and that when ballots have fairly and constitutionally decided, there can be no successful appeal back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections."

Lest there might be some uneasiness in the minds of candid men as to what was to be the course of the government toward the Southern States after the rebellion had been suppressed, Mr. Lincoln thought it proper to say that it would be his purpose then, as ever, to be guided by the Constitution and the laws; and that he probably would have no different understanding of the powers and duties of the Federal Government relatively to the rights of the States and the people, under the Constitution, than that he had expressed in the inaugural address.

He desired to preserve the Government, that it might be administered for all as it was administered by the men who made it. Loyal citizens everywhere had the right to claim this of their Government, and the government had no right to withhold or neglect it. In thus publishing his intentions, the President denied that he meditated coercion, conquest, or subjugation, in any just sense of those terms.

The Constitution provided, and all the States had accepted the provision, that "the United States shall guarantee to every State in this Union a republican form of government." But if a State might lawfully go out of the Union and did go out, it might also discard the republican form of government; so that, to prevent its going out was an indispensable means to the end of maintaining the guarantee mentioned. "When an end is lawful and obligatory," concluded he, "the indispensable means to it are also lawful and obligatory."[1]

Lincoln had given utterance to the national idea and, nowhere else is it more clearly expressed. Civil war was to determine whether the government of the people of the United States should be National,—with its foundations deep laid in industrial freedom,—or confederate, resting upon the bondsmen's unrequited toil. That Lincoln clearly understood the issue is evident from many of his later utterances as in his first annual message: "It continues to develop," said he, "that the insurrection is largely, if not exclusively, a war upon the first principle of popular government—the rights of the people. Conclusive evidence of this is found in the most grave and maturely considered public documents as well as in the general tone of the insurgents. In those documents, we find the abridgment of the existing right of suffrage and the

[1] Lincoln's Works, II, 57-65.

denial to the people of all right to participate in the selection of public officers except the legislative, boldly advocated, with labored arguments to prove that large control of the people in the government is the source of all political evil. Monarchy itself is sometimes hinted at as a possible refuge from the power of the people." "In my present position I could scarcely be justified were I to omit raising a warning voice against the approach of returning despotism."[1]

Early in August Congress passed a law confiscating rebel property.[2] It declared that whenever any person held to labor or service under the law of the States was permitted by the person to whom such labor or service was due to be employed in any way against the lawful authorities of the United States, that the owner's claim to service should thereby be forfeited. This law affected untold millions of property, and, primarily, property in slaves. Thus, at the beginning of the war, the national government, for its own security, was compelled to make this form of property insecure, whenever it was used against the United States. Before the close of the month, the meaning of the act was tested, in an unexpected way, by a proclamation from General Fremont, declaring free all slaves, the property, real and personal, of persons in the State of Missouri who had taken up arms against the United States, or given its enemies aid or comfort.[3] Three days later, the President, in a letter to Fremont, asked him to modify his proclamation, so as to conform to the act of August sixth; and, nine days later, he peremptorily ordered its modification. The order was obeyed. But Fremont's hasty act was a step toward emancipation which

[1] Lincoln's Works, II, 104, 105. December 3, 1861.
[2] Statutes at Large, XII, 319. August 6, 1861.
[3] August 30, 1861; War Records, III, 446.

was never retraced. At this time, whatever the President thought of the principle, he was not persuaded of the expediency of emancipation. The people were not ready for it.

It is difficult, perhaps impossible, for an American, unaccustomed by birth and inheritance to a slaveholding community, to understand the meaning of the word *property* as applied to a slave. To the people of the South, slaves were human beings and property; but primarily, property. To anti-slavery people in the North, they were human beings held in bondage without cause. When Kentucky, in 1849,[1] debated the question, whether to empower its legislature to emancipate slaves, and, when a year later, the same question was discussed in Maryland and in Virginia,[2] the conclusion reached, in each State, was to deny the exercise of power without the consent of the owner, for the reason, that no man's property can be lawfully taken from him without his own consent and without compensation. This principle of government was interpreted by the supporters of slavery to apply to the slave, as much as to any other form of property; and the

1 For account of the discussion in Kentucky, see my Constitutional History of the American People, 1776-1850, II, Chapters i, iv, v, vi.

2 For the discussion in Maryland, see Debates in Proceedings of the Maryland Reform Convention to Revise the State Constitution as Adopted. Published by Order of the Convention, 2 Vols., Annapolis; William McNeir, Official Printer, 1851, 550 pp., 890 pp. Proceeding (Journal) of same, Annapolis; Riley & Davis, Printers, 850, 895 pp. x 8 x 3 pp. Journal, Acts and Proceedings of a General Convention of the State of Virginia, Assembled at Richmond on Monday, the fourteenth day of October, Eighteen Hundred and Fifty, Richmond; William Culley, Printer, 1850, 424 pp., with Appendix and Reports. Documents containing Statistics of Virginia ordered to be printed by the State Convention Sitting in the City of Richmond; William Culley, Printer, 1851; 8vo, 500 pp.

storm of passion, which the abolitionists provoked in the South, was merely a sign of unyielding opposition to being robbed.

The Government of the United States, in 1861, did not wage war to exterminate slavery. The hundreds and thousands of men who enlisted in response to the President's first call had no thought of fighting to free the negro. It was the supremacy of the national government, the Union of the people of the United States, that was to be saved. Had the President, or had Congress, then announced that the war was for the abolition of slavery, there is little doubt that the Union would have been dissolved. Fremont's proclamation, whatever its political purpose, was essentially a permit to commit robbery, even though the property stolen be changed in the transaction, from slave to freeman. In the border States, property in slaves was less secure than farther South, and many a slave owner in Kentucky and Maryland, convinced of its insecurity and unprofitableness, was ready to emancipate his slaves for a compensation. An argument for emancipation, heard occasionally in the Southern States, down to the time of the war, was now met by the reply, that for a State to encourage or allow emancipation was to invite a horde of free persons of color, whom the South, and indeed the North, considered the most undesirable population in the world.[1] Therefore, on the ground of public policy, Southern legislatures were forbidden, by State constitutions, to enact general laws allowing the emancipation of slaves.[2] Emancipation was occa-

[1] For account of the treatment of free persons of color and the esteem in which they were held North and South, see my Constitutional History of American People, 1776-1850, I, Chap. XII.

[2] The Provision of the Constitution of Virginia, 1850, respecting slaves and free negroes was typical of that found in other Southern constitutions at the time; "And all slaves hereafter emanci-

sionally permitted as a favor to an individual, but it was not to be construed as a precedent.[1]

But the war suddenly changed social conditions North and South. The North began to look upon the negro with more leniency; and, as the national armies moved into the slaveholding States, they became the rendezvous of thousands of negroes, who had escaped from their masters, or who had been seized under the act of confiscation. Though society in the South was thus demoralized, the great body of slaves, more than the majority, remained faithful to their masters. There were good negroes and bad on the old plantations, and it was mostly the bad ones who ran away to the national camps. Whether seized as property and confiscated, or remaining faithful to their masters, these contrabands were a source of embarrassment to the national government, which, under the Constitution and the laws was bound to protect slave property wherever found; yet now, amidst the throes of war, it was obliged to treat it as a munition of war. The President early began the solution of the difficulty. Slaves set free under the act of forfeiture were already dependent upon the United States and must, in some way, be provided for.

pated shall forfeit their freedom by remaining in the Commonwealth more than twelve months after becoming actually free, and shall be reduced to slavery under such regulation as may be prescribed by law."

"The general assembly may impose such restrictions and conditions as they shall deem proper with power of slave owners to emancipate their slaves; and may pass laws for the relief of the Commonwealth from the free negro population by removal or otherwise."

"The General Assembly shall not emancipate any slave, or the descendant of any slave, either before or after the birth of such descendant." Article IV, Sections 19, 20, 21.

1 See Chap. 12, cited in note above, for reference to the principal laws of the States on emancipation, prior to 1860.

He recommended that Congress provide for accepting such persons from the States according to some mode of valuation, say in lieu of direct taxes, and hoped that some of the States might pass similar enactments for their own benefit. Once accepted by the United States, these persons were to be considered free, and steps should be taken for colonizing them. Perhaps free persons of color throughout the United States might be interested in colonization. The government might acquire suitable territory in South America, or elsewhere, and thus free itself of an embarrassing population.[1] Colonization would relieve the country of negroes, liberated either by act of Congress, or by an assembly.

But in his message, the President formally declared that the Union must be preserved, and that "all indispensable means must be employed." Thus, as far as he was concerned, he left the question of means open, for future events to determine. Clearly, the ultimate means was the abolition of slavery; but in December, 1861, neither the President, nor many of the party to which he belonged, thought seriously of this extreme. Gradual emancipation had been tried in the Northern States;[2] might it not be tried again especially in the border States? If slave owners there were compensated, might it not be applied in other States the more easily? But emancipation by the United States, whether with, or without, compensation, raised many grave political questions. Delaware, the smallest State and having the fewest slaves, was naturally thought to be a favorable field in which to attempt the compensatory plan. The President drafted a

[1] See Lincoln's Annual Message, December, 1861: Lincoln's Works, Vol. II, p. 102.

[2] By Statute in Pennsylvania in 1780; in Connecticut and Rhode Island, 1784; in New York, 1789; and in New Jersey, 1804.

scheme for that State by which slavery should gradually disappear. But Delaware, though small, fully represented opposition to the idea, which, its assembly declared by a disapproving vote, would only encourage the supporters in Congress and in the North in favor of abolition. The right alone belonged to Delaware, as to any other State, to abolish slavery within its own boundary. The attitude of Delaware was typical of that of other border States.

The confiscation act, of 1861, was amended, in July of the following year, and made more comprehensive and explicit, especially as to slaves found within any place occupied by rebel forces or escaping from masters engaged in rebellion against the United States, and taking refuge in any of its armies. They were to be treated as captives of war and be forthwith and forever free. But even more significant of the great change going on in the country was the authority the act gave the President to employ as many persons of African descent as he thought necessary and proper for the suppression of rebellion; for which purpose he might organize and use them for the public welfare, in such manner as he might judge best; and he might colonize persons freed by the act, who were willing to emigrate, the consent of the country to which they would go having been first obtained. The colonists were to have all the rights and privileges of freedmen.[1]

This authority given the President to organize negro regiments was without precedent. Louisiana at the close of the war of 1812, had authorized the enrollment of regiments of free persons of color.[2] A few free negroes fought in the ranks in the battles along the Northern frontier during this war, and a few served in some of its naval engagements; but no distinct organization of negro troops

1 See Statutes at Large, Vol. XII, pp. 591, 592.
2 Act of January 30, 1812.

had ever been known in the United States military service. The constitutions of more than thirty of the States expressly forbade the enrollment of negroes in the militia.[1] The act of July, therefore, was a startling departure from precedent, which, it seemed improbable, even the free States would follow. But Congress was doing many things quite without precedent. On the nineteenth of June, it cut the Gordian knot which so long had defied the strongest and most cunning of our statesmen, by abolishing slavery in all the territories of the United States.[2]

This act put into legal form a clause in the platform on which Lincoln was elected, declaring that the normal condition of all the territory of the United States is that of freedom; that, as our Republican Fathers, when they had abolished slavery in all our national territory, ordained that "no person should be deprived of life, liberty or property without due process of law," it was our duty, by legislation, whenever necessary, to maintain this provision of the Constitution against all attempts to violate it. The authority of Congress, of a territorial legislature or of any individuals, to give legal existence to slavery in any Territory of the United States was denied.[3]

The transformation of a plank in a party platform into an act of Congress, well illustrates what, in the United States, we understand by the term, "the administration of government." The abolition of slavery in the territories was approved throughout the North, and was the

[1] In all the States practically, excepting New Hampshire, Vermont, Massachusetts and New York. For a discussion of the exemption of free negroes from military duty, see my Constitutional History of the American People, 1776-1850, II, 235, et seq.

[2] Statutes at Large, XII, 432. June 19, 1862.

[3] Johnson's Republican National Conventions (1860), 132 (No. 8).

final answer of Congress in 1862 to the great question discussed in the Lincoln-Douglas debates, four years before, when the Republican party was first formulating its political principles, whether Congress was empowered, under the Constitution, to control as to slavery in the territories.[1]

A week before this act was passed, slavery was abolished in the District of Columbia, and the old law of excluding witnesses on account of color, in judicial proceedings, was repealed.[2] On the seventh of April, the United States and Great Britain concluded a treaty at Washington for the suppression of the African slave trade.[3] The agreement between the two nations contained instructions for the employment of their navies to prevent the traffic. Thus in the months of June and July, 1862, Congress exercised the power of the United States toward the abolition and extinction of slavery as never before. But as yet abolition was restricted to the territories.

Though Delaware refused to co-operate with the President, in gradual and compensatory emancipation, he did not cease his efforts to inaugurate a compensatory plan. On the sixth of March, 1862, he had sent a special message to Congress, recommending compensated emancipation, basing his proposition upon a resolution, the adoption of which he urged upon the two Houses,—that the United States ought to co-operate with any State which might adopt gradual abolition, by giving pecuniary aid, to be used by the State at its discretion. It passed, as a joint

[1] See these debates either in Lincoln's Works, I, or in their original form as published at Columbus, Ohio, by Follett Foster and Company, 1860; also see the address at Cooper Institute, February 27, 1860. Lincoln's Works, I, 599, 612.

[2] Statutes at Large, XII, 539.

[3] Treaties and Conventions, 454-467.

resolution, on the tenth of April following.[1] It showed the way public events were trending. In an interview with some members of Congress from the border States, on the tenth of March, the President explicitly stated that he desired his proposition accepted voluntarily, as "emancipation was a subject exclusively under the control of the States, and must be adopted, or rejected, by each for itself." He did not claim that the United States had "any right to coerce them for that purpose."[2] Clearly the power of Congress to control as to slavery in a territory was very different from the power in a State, and the President was careful to recognize this. It was about this time that he communicated to Senator McDougall, of California, an estimate of the cost of gradual emancipation, with compensation. The cost of the war for eighty-seven days,—one hundred and seventy-four millions of dollars,—would pay for all the slaves in the four border States and the District of Columbia.[3]

Lincoln saw clearly what was coming, as is evident from his appeal to the border States representatives to favor his plan,[4] which was the payment, to the States, of four hundred dollars for each slave in twenty equal annual instalments in six per cent national bonds. He did not neglect to point out the advantage of distributing the cost over

[1] Statutes at Large, XII, 617.

[2] Lincoln's Works, II, 133.

[3] Thus, slaves in Delaware..... 1,798
" " " Maryland 87,188
" " " District of Columbia..... 3,181
" " " Kentucky 225,490
" " " Missouri 114,965

432,622
400

Cost of slaves.....$173,048,800
Eighty-seven days' cost of the war.... 174,000,000

[4] March 14, 1862, Lincoln's Works, II, 137.

a long period of time, as compared with the disadvantage of raising an equal amount for war purposes. But the border States Congressmen, who listened to him, could see no way of removing the well known and oft declared objections of State sovereignty, the inexpediency of abolition, and the denial of the right of the United States to initiate emancipation in a State. He frankly asked them what better their States could do than to follow this plan. Would they prefer to restore the constitutional relation of other States of the Nation without destroying the institution of slavery? If this was done, he said that his whole duty in the matter under the Constitution and his oath of office would be performed. But it was not done, and the Nation was trying to accomplish it by war. The incidents of war could not be avoided. If the war continued long, as it must if the object was not sooner obtained, the institution in the border States would be extinguished by mere friction and abrasion—by the mere incidents of war. It would be gone and their people would have nothing valuable in lieu of it. He then made a strong appeal both to their cupidity and their patriotism. Better save the money than sink it in war; better have the border States as sellers and the Nation as a buyer, "than to sink both the thing to be sold and the price of it in cutting one another's throats." Abundant room could be had in South America for colonization.

In the preceding May,[1] Major General Hunter had declared the slaves in Georgia, Florida and South Carolina forever free, but the President, ten days later, countermanded this order and declared that he alone as Commander-in-Chief of the army and navy, was competent to issue such a proclamation. But, to a border State representative, he confessed that in repudiating Hun-

[1] May 9, 1862.

ter's general order he had given dissatisfaction, if not offence, to many whose support the country could not afford to lose. Nor was that the end; the pressure upon him was increasing. Why could not the border States yield to his suggestion and relieve the country in this important point?[1]

The form of original confiscation bill was not fully approved by the President. He transmitted to Congress a brief statement of what he considered its imperfections: "It is startling to say that Congress can free a slave within a State, and yet, if it were said the ownership of the slave had first been transferred to the Nation, and that Congress had then liberated him, the difficulties would vanish."[2] Slaves as property and munitions of war in the hands of the enemy were forfeitable to the general government, like any other form of property. Congress could then decide the future status of this property, and there could be no objection to its declaring the slave a free man. The right of a State to control its domestic affairs, its police right, recognized, from the earliest history of the government, in its constitution and confirmed by judicial decisions, must be respected. If Congress were to invade this ancient right, it would antagonize the loyal States. Emancipation, therefore, must proceed with due respect to this ancient right. If by the fortune of war, or by purchase, a slave should become the property of the United States, the general government could do as Kentucky and other States had done, liberate him; but Congress had no power, under the Constitution, to invade the right of a State, and declare slaves to be free men. In other words, emancipation must proceed as a war measure. The slaves were equal to a large and effective con-

1 Lincoln's Works, II, 155, 205.
2 Lincoln's Works, II, 210.

federate army in the field. The national government must therefore maintain a force to offset the power of slavery. Why not treat slaves in those portions of the United States in rebellion as munitions of war and eliminate them from the contest?

But a military procedure of this kind must follow national victories, otherwise it could be of no effect; therefore the great thing the government wanted in the summer of 1862 was a victory. On the twenty-second of July the War Department issued an order authorizing military and naval commanders, within the States in rebellion, to seize and use, for military purposes, any real or personal property necessary or convenient for their commands, and also to employ, as laborers, and for military and naval purposes, as many persons of African descent as could advantageously be used.[1] On the same day, the President submitted to his cabinet the draft of an Emancipation Proclamation. He based it upon the authority of the act of Congress of July seventeenth. It warned all persons, in rebellion against the government of the United States, to return to their allegiance, on pain of the forfeiture and seizure authorized by the act; and it made known the purpose of the President again to recommend to Congress the adoption of practical measures for compensated emancipation and gradual abolition, as a fit, military measure for effecting this object.

As Commander-in-Chief of the army and navy, the President now declared that on the first day of January, 1863, all persons held as slaves, within any State wherein the constitutional authority of the United States should not then be practically recognized and maintained, should "then, thenceforward and forever be free."[2] The emanci-

[1] Lincoln's Works, II, 212.
[2] Lincoln's Works, II, 213.

pation of the slaves in the States in rebellion was thus made a military matter. The proposed proclamation would free slaves, but would not,—because it could not,—abolish slavery. The method conformed to the President's ideas, already expressed, of recognizing the right of a State to control its police and domestic institutions, but of exercising the military right of the national government to destroy the resources of the enemy. With forfeiture of the enemy's property, its title went to the Nation, and it could then do with the property as it chose. The proposed Proclamation announced what treatment and use the national government would make of this property. Had the States, in rebellion, returned then to their allegiance, the Proclamation would not have been issued.[1]

While anxiously waiting for a national victory, the President was engaged in appeasing the clamor of the more radical supporters of his administration, who were demanding immediate abolition. His position, in the great change going on, was again and again clearly stated, and nowhere more explicitly than in his letter to Horace Greeley in answer to an unjust criticism: "If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My prime object in this struggle is to save the Union and is not either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all of the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race I do because I

[1] The President issued this preliminary Proclamation July 5, 1862. Lincoln's Works, II, 214.

believe it helps to save the Union; and what I forbear I forbear because I do not believe it would help to save the Union. * * * I intend no modification of my oft expressed personal wish, that all men everywhere could be free."[1]

About a week before this letter was written, in an address to a deputation of free colored men, the President discussed at length the advantages of colonization in Liberia, or in Central America, plainly telling his listeners, that, even when they ceased to be slaves, they were far removed from equality with the white race; it was far better for them to dwell apart by themselves;[2] and he outlined, what he considered, a practical colonization plan. But the Emancipation Proclamation was on his mind, and on the twenty-second of September, he read it to his Cabinet and invited their criticisms.

Convinced that the Proclamation would be supported by the people of the loyal States, he was awaiting a favorable moment for issuing it. His plan was to compensate loyal owners of slaves; to carry out a system of voluntary colonization, and to emancipate all slaves, in States in rebellion, on the first day of the new year. On the seventeenth of September, the national arms were victorious at Antietam, and on the twenty-second the Preliminary Proclamation was issued.[3] It freed the slaves in designated States, and parts of States that might be engaged in rebellion on the first day of January, 1863, but it did not abolish slavery, as an institution, in the designated or in other regions. The effect of the Proclamation was at first somewhat disastrous, as the ensuing fall elections

1 Lincoln's letter to Greeley, August 22, 1862. Lincoln's Works, II, 227.

2 August 14, 1862. Lincoln's Works, II, 225.

3 Lincoln's Works, II, 237, 238.

resulted in a choice of Congressmen, the majority of whom were opposed to the administration; but most of the loyal Governors and a large majority of the Republicans in Congress supported the measure both as expedient and as fully warranted by the Constitution.[1] The issuing of this Proclamation by the President was the exercise of all authority possessed by the executive branch of the government of the United States for the abolition of slavery. It was strictly a military measure. What constitutional changes might follow could only be conjectured; but, interpreted by the principle which the President had himself laid down, the States alone could abolish slavery within their own borders. If abolishment was to be permanent; if the institution of slavery was to be destroyed, must not the States themselves destroy it?

Events leading to such a result had meanwhile been pressing fast. For more than a half century, Virginia had consisted of two parts and two peoples: the Eastern and lower portion, the lowlands; the Western and newer portion, the highlands. As far back as 1830, when Madison, Marshall, Monroe, Upshur and Giles were assembled, with many other delegates, to frame a new constitution for the Commonwealth, the differences between its eastern and western portions were clearly recognized, and were harmonized, for a time, at least, by the plan of compromise projected and carried through by Madison. These differences arose chiefly from inequalities in representation, and from hostility to slavery, in the western counties.[2]

[1] The action of the House, December 15, 1862, as given in Nicolay and Hay's Lincoln: A History, VI, 171. See also The Congressional Globe for December, 1862.

[2] See the Proceedings and Debates of the Virginia State Convention of 1829-30, to which are subjoined the New Constitution of Virginia, and the Vote of the People. Richmond: Printed by

The people of the forty counties comprising the highlands of the State did not join with those of the lowlands when Virginia seceded, but organized a loyal government, at Wheeling, in June, 1861. Francis H. Pierpoint was chosen Governor; a legislature was formed; United States Senators were chosen, and all the machinery of a loyal State set in motion. Acting both as convention and legislature, the Wheeling delegates, by an ordinance, on the twentieth of August, provided for the organization of a new State. The question was submitted to the people, who answered it, in October, by an overwhelming affirmative vote.[1] On the twenty-sixth of November, the delegates chosen assembled at Wheeling, and in convention during the next sixty days, prepared a constitution of government for the new State; to which the name, West Virginia, was given. The people of the forty counties within the new jurisdiction, ratified the work of the convention in a special election, in April, and the fate of the new Commonwealth was left to Congress.[2] The election on April third, 1862, resulted in the adoption of the Constitution.[3]

The petition of the people of West Virginia for admission into the Union raised questions for the settle-

Samuel Shepherd & Co., for Ritchie & Cook, 1830. Also, Journal Acts, and Proceedings of a General Convention of the Commonwealth of Virginia Assembled in Richmond on Monday, the Fifth Day of October, in the Year of Our Lord, One Thousand Eight Hundred and Twenty-nine. Richmond: Printed by Thomas Ritchie, 1829. James Monroe was President of this Convention, and among its members were James Madison, John Marshall, John Tyler, John Y. Mason, John Randolph, Phillip P. Barbour, Abel P. Upshur. Its debates were cited in Southern Conventions for the next twenty years.

1 18,408 for, and 781 against, the proposition.

2 The Convention assembled at Wheeling November 26, 1861, and adjourned February 18, 1862.

3 By 18,862 votes in its favor, and 514 against it.

ment of which there was no precedent. Kentucky, Tennessee and Maine had been parts of older States. Vermont, while claiming to be a free and independent State, had been claimed by New Hampshire, Massachusetts and New York, but the admission of these four States had been in times of peace. The Constitution of the United States had been observed and Congress and the legislatures of the States concerned, and they included Virginia and North Carolina, had given their consent to the formation of the new Commonwealths. But, in 1861, the question of what constituted the State of Virginia might be variously answered. The supporters of the Southern Confederacy would have said that the true area of Virginia was the same as it had been since the admission of Kentucky; but Union men might answer that the State consisted in its loyal population, and that the government of Virginia convened at Wheeling, which the President had recognized and was supporting, was its true government. Therefore its assent to the division of the State complied with the provision of the national Constitution.

The bill for the admission of West Virginia passed Congress on the thirty-first of December, 1862. The Constitution of the new State provided that no slave should be brought, or free person of color be permitted to come, into it for permanent residence.[1] This provision was eliminated during the progress of the bill through Congress; and, in accordance with the wishes of the people of the State, Congress substituted a clause for the gradual emancipation of slaves, on and after the fourth of July, 1863. All within the State, under the age of ten years, at the time, should be free, at the age of twenty-one; all over ten, and under twenty-one, should be free, at the age of twenty-five; no slave should be permitted to come into the

[1] Constitution of West Virginia, 1861, Article XI, Section 7.

State for permanent residence.[1] The clause excluding slaves recalls the famous provision, originating with Benton and inserted in the Missouri constitution of 1820, for excluding free persons of color from that State.[2] West Virginia would now exclude slaves. Its constitution was a sign of the changes of forty years. The State of West Virginia should be admitted by proclamation.

This proviso necessarily led the President to a most careful examination of the constitutionality and the expediency of the law. On this point the Cabinet was divided,[3] but the decision rested with the President. His opinion, which doubtless hereafter will be construed as a precedent, resulting as it did, at a critical time, in the admission of a new State, formerly slaveholding, but now abolishing slavery, stands as a practical solution of a new problem and at the same time as a factor of great moment in the final overthrow of the institution. "The consent of the legislature of Virginia," wrote the President, "is constitutionally necessary to the bill for the admission of West Virginia becoming a law. A body claiming to be such legislature has given its consent. We cannot well deny that it is such, unless we do so upon the outside knowledge that the body was chosen at elections, in which a majority of the qualified voters of Virginia did not participate. But it is a universal practice, in popular elections in all these States, to give no legal consideration whatever to those who do not choose to vote, as against the effect of the votes of those who do choose to vote. Hence,

1 Statutes at Large, XII, 634.

2 For account of the Missouri controversy of 1820, see my Constitutional History of the American People, 1776-1850, I, Chapter X.

3 For the opinions of its members, see Nicolay and Hay's Lincoln, VI, 300-309.

it is not the qualified voters, but the qualified voters who choose to vote, that constitute the political power of the State. Much less than to non-voters should any consideration be given to those who did not vote in this case, because it is also matter of outside knowledge that they were not merely neglectful of their rights under, and duty to this government, but were also engaged in open rebellion against it. Doubtless among these non-voters were some Union men whose voices were smothered by the more numerous secessionists, but we know too little of their number to assign them any appreciable value." Could the National Government stand, if it indulge constitutional constructions by which men in open rebellion against it were to be accounted, man for man, the equals of those who maintained their loyalty to it? Were they to be accounted even better citizens, and more worthy of consideration, than those who merely neglected to vote? If so, their treason against the Constitution enhanced their constitutional value. Without braving these absurd conclusions, it could not be denied that the body which consented to the admission of West Virginia was the legislature of Virginia. Mr. Lincoln did not think the plural form of the words "legislatures" and "States" in the phrase of the Constitution, "without the consent of the legislatures of the States concerned,"[1] had any reference to the case before him. That plural form used, he believed sprang from the contemplation of two or more old States contributing to form a new one. The idea that a new State was in danger of being admitted without its own consent was not provided against, because, as he conceived, it was not thought of. The Union must take care of its own. It could not do less and live.

The question of the expediency of admitting West

[1] Art. IV, Sec. 3, Cl. 1.

Virginia was, in the President's opinion, more a question for Congress than for the Executive. Yet he did not evade it. More than anything else, it depended on whether the admission or rejection of the new State would, under all the circumstances, tend the more strongly to the restoration of the national authority throughout the Union. That which helped most in this direction was the most expedient at this time. Doubtless those in the remaining portion of Virginia would return to the Union less reluctantly without the division of the old State than with it, but he thought that the nation could not save as much in this quarter by rejecting the new State as it would lose by it in West Virginia. The aid of West Virginia could not be spared in the struggle going on, much less could the Nation afford to have her people in opposition. Her brave and good men, he said, regarded her admission into the Union as a matter of life and death. They had been true to the Union under very severe trials. The Nation had so acted as to justify their hopes, and it could not fully retain their confidence and co-operation if it seemed to break faith with them. Again, the admission of the new State turned that much slave soil into free, and thus would be a certain and irrevocable encroachment upon the cause of rebellion. The division of a State might be dreaded as a precedent, but a measure made expedient by war is no precedent for times of peace. It had been said that the admission of West Virginia would be secession, and be tolerated only because it was secession carried out by the national party. By whatever name it was called there was still difference enough between secession against the Constitution and secession in favor of the Constitution. For these reasons Mr. Lincoln believed the admission of

West Virginia into the Union is expedient.[1] On December thirty-first, 1862, he signed the bill.

The State convention reassembled on the twelfth of February following, and substituted the provision adopted by Congress for the clause in the original Constitution; and, on the twenty-sixth of March, the amended instrument was ratified by the popular vote. On the nineteenth of June, West Virginia became the thirty-fifth State in the Union. It was the first slaveholding State which provided for gradual emancipation, but so swiftly did public opinion change that in less than two years from the day of its admission its legislature was preparing to submit a constitutional amendment for the immediate abolition of slavery.

In accordance with the notice given in the preliminary Emancipation Proclamation, the President, in his annual message, in December, recommended to Congress an amendment to the Constitution, providing for compensation from the United States to every State that should abolish slavery before the first day of January, 1900; all slaves freed by the chances of war, during the rebellion should be forever free, and Congress might provide for colonizing free colored persons, with their own consent, at any place without the United States. This proposed amendment the President supported by argument and elaborate illustration. His plan called for "a permanent constitutional law."[2] The success of the national forces, early in 1862, prepared the way for the reconstruction of civil affairs in those portions of the rebel States under national authority. The President's policy

[1] Lincoln's Works, II, 285-287. The original language is closely followed.

[2] Annual Message to Congress, December 1, 1862; Lincoln's Works, II, 261-277.

in the case of West Virginia was continued, but in a military form. In brief, the loyal population of the States in rebellion should be recognized as the body constituting these States and should be protected in organizing loyal governments. These necessarily took a military form, because the loyal inhabitants were not able to protect themselves, and must for some time depend upon national support.

On the fourth of March, 1864, Andrew Johnson was confirmed as military governor of Tennessee; on the nineteenth of May, Edward Stanley, of North Carolina; in March, Colonel G. F. Shipley, of Louisiana, and John S. Phelps of Arkansas. In no two of these States was the condition or course of affairs alike, but the general policy of the President was uniform for all. The military power of the Nation should protect the loyal inhabitants of the States until they should organize civil governments in conformity to the Constitution.

It would appear, from our imperfect knowledge of the President's ultimate plan (which suddenly came to an end with his untimely death), that he intended to withdraw the military power as soon as Congress was convinced that loyal governments had been permanently established. The bearing of these first provisional governments upon the abolition of slavery is somewhat indirect, but yet of great importance, because they were fully in accord with the President's attitude toward slavery, which, it should be remembered, was as he expressed it in his letter to Horace Greeley, that all men everywhere should be free. Although brief the authority of these military governors, they were hostile to slavery and contributed effectually to its abolition. That Southern men recognized this is evident from the interpretation which was soon put upon the efforts toward mili-

tary occupation of the South put forth by the general government. In his brief correspondence with these military governors and with others on the subject of reconstruction, Mr. Lincoln expressed his purpose of leaving the loyal citizens of the South free to set up State governments conforming to the national Constitution. They should have the protection of the army, but it should be withdrawn as soon as the State government could dispense with its aid.[1]

The gradual occupation of States in rebellion by the national armies constantly increased the number of freedmen, and made it the more necessary for the government to employ the negroes as laborers, soldiers and marines. It is well to keep in mind that the whole policy of the Proclamation of Freedom was "one of general military emancipation."[2] Designed as a military measure, it was inevitable that its beneficiaries should be used for military purposes. During the summer of 1862 the public mind became familiar with the thought of negro troops, organized, equipped and officered for the defense of the Union, and the conclusion was reached, though slowly, that equal dangers and services demanded equal pay and recognition. The American mind is essentially fair and judicious, and it was bound, sooner or later, to recognize the civil and political claims of the colored people, as soldiers in the ranks, fighting for the preservation of the Union. Hostility to negro troops[3] was intense among

[1] The correspondence of the President in the matter of reconstruction begins practically with his letter to Reverdy Johnson, July 26, 1862, and continues at intervals till shortly before his death; see letter to Cuthbert Bullitt, of New Orleans, July 28, 1862. Lincoln's Works, II, 215-217.

[2] Nicolay and Hay's Lincoln, VI, 440.

[3] For a succinct and comprehensive account of the negro troops see Nicolay and Hay's Lincoln, VI, 20, 21.

many white regiments, officers and privates, and a powerful political party in the country was never reconciled to them, but valor in the field speedily silenced the more bitter opposition, for a man who will offer himself for his country, be he white or black, is an unanswerable argument to all sorts and kinds of constitutional and legal objections as to his racial position and his social rank. The conduct of the negro troops during the crucial summer of 1862 was a factor almost equal in potency with the Emancipation Proclamation itself, in working out the abolition of slavery.[1] It was literally turning the guns of the enemy against him. It was an agency that won the Nation's heart. We must remember that, after all, it is public opinion that makes constitutions and laws.

The Emancipation Proclamation was not issued, nor were negroes armed by the United States, as a matter of mere sentiment. Both Proclamation and black regiments were the stern necessity, and we incline to believe that both must be ranked as almost equal forces in the overthrow of slavery. The Proclamation could not be repealed; the negroes could not be put back into slavery. When, therefore, on the first of January, 1863, the final proclamation, of which the country had been duly warned, was issued the people were prepared to accept it, not only as a military, but also as a political, ultimatum. The Proclamation, though it did not abolish slavery, forever freed nearly four millions of human beings living, at

1 The President was ever watchful and considerate of the negro regiments. He constantly exercised his authority to secure them equal treatment with white troops. See his letter to Charles Sumner, 1863. Lincoln's Works, II, 342. Also his order of retaliation, July 30, 1863, Id., p. 378, and his letter to General Grant, August 9, 1863, Id., 384. See also the Congressional Globe for March, 1863, p. 93.

the time, in the States, and portions of States, engaged in rebellion against the national authority.[1] Between the preliminary and the final proclamation, West Virginia had adopted a plan of gradual emancipation, so that the new year opened with the United States pledged to freedom, and with former slaveholding Commonwealths initiating a policy of abolition and gradual emancipation. Both national and State authorities were now cooperating to abolish the institution.

The new year, opening with the edict of freedom, was to witness a profound change in the opinion of the people of the slaveholding States regarding slavery. The Proclamation of the first of January had made known the President's intention of receiving the freedmen into the armed service of the United States. The inclusion of this provision was profoundly significant; its effect upon the negroes themselves was inspiring and quite beyond measure. To the white people of the country it signified that the millions of blacks, so long the cause of discord in the Union, were henceforth not only to be free, but were immediately, so far as practicable, to help bear the burden of nationality. Perhaps the President, in his large wisdom, knew of no other way in which to give employment to freedmen of suitable condition. It was an exceptionally wise arrangement, and, as was frequently heard, in a homely phrase of the day, "it made good use of the negro." It put a new value upon him in his own estimation; gave him a taste of the duties and privileges

[1] The number actually set free by the proclamation is not accurately known; a strong minority party in the North and all the South claimed that it set none free. For a discussion maintaining the impotency of the Proclamation see Joel Parker's Law Lectures, delivered at Harvard College, 1866, and at Harvard and Dartmouth, 1867-8, 1869. Hurd and Houghton, New York, 1866-9.

of a free man, and also prepared him for citizenship. A man who would risk his life in battle for the country would be a strong candidate for its civil and political privileges.[1] Thus the Emancipation Proclamation raised other questions than that merely of setting slaves free. Latent in the edict was the whole question of United States citizenship, and, chiefly, in its provision for receiving freedmen of suitable condition into the armed service of the United States.[2]

The liberal and humane policy of the people of West Virginia toward the negro resembled the policy, which, for two years, had been slowly and with difficulty developing in Missouri. On the twenty-eighth of February, 1861, at the city of Jefferson, the State met in convention to discuss the great questions of the hour, and to adopt a policy. The delegates, with few exceptions, were men of Southern birth, and the majority of them were lawyers.[3] Missouri was disposed to act the part of national peacemaker. Many delegates favored a new federal convention; the minority, in event of the refusal of

[1] The act of Virginia, of 1723, provided that no negro should be set free except for meritorious service, to be judged by the country and council. In 1863 the negro troops were performing a meritorious service of which the Nation was soon to judge, and the only adequate reward would necessarily be some recognition of his civil and political rights.

[2] For an account of the preliminary and final Emancipation Proclamations and a facsimile of the original manuscript, see Nicolay and Hay's Lincoln, History, VI, 6, 8, 19. The text of each is given in Statutes at Large, XII, 1267-1269.

[3] The nativity of the members was as follows: Kentucky, 30; Virginia, 23; Missouri, 14; Tennessee, 10; New York, New Hampshire, North Carolina, 3 each; Pennsylvania, Germany, Illinois, 2 each; and one each from Maryland, New Jersey, Ohio, Alabama, Maine, Austria, Ireland. There were thirty-two lawyers, twenty-five farmers, eleven merchants. Journal Proceedings of the Missouri State Convention held at Jefferson City and in St. Louis, March, 1861, pp. 5, 7.

the Northern States to agree to some adjustment of the slavery question, would have Missouri take a decided stand in favor of the South;[1] but State pride, strongly intrenched, would make Missouri the arbitrator in the great dispute. The State was an integral part of the great West, which was faithfully attached to the Union. Inviting her sister States to ignore the dogmas of New England, on the one hand, and of the Gulf States, on the other, she would at once inaugurate a Western policy of loyalty.[2] Missouri agreed with the prevailing sentiment of the day that the Constitution of the United States was a compact between the States, and the general government was a *confederacy,*[3] but the State would do nothing to countenance the right of secession. Let the Crittenden resolution be adopted and the darkness that overshadowed the land would be dispelled. Any attempt of the general government to coerce the seceding States would involve the whole nation in civil war, and hopelessly dissolve the Union. The border States held the balance of power; let them unite upon a plan of adjustment between the factions.[4] The causes of the sudden disruption of the Nation lay in the alienated feelings extending North and South, rather than in actual injury either had suffered.[5]

The position of Missouri relative to adjoining States that continued in the Union would necessarily expose her to total destruction if she became a part of the new Confederacy, whenever any rupture might take place between the different Republics. From a military point of view, to cease connection with the Northern Confederacy

1 A Resolution to this effect was defeated seventy to twenty-three. Journal, p. 47.

2 Journal, p. 31.

3 Journal, 32.

4 Journal, 35, 37.

5 Journal, 55.

meant the annihilation of the State. Its larger interests would not tolerate a system of free trade; immigration to the State would cease, for no slaveholder would come to a frontier State, nor a Northern man to a foreign country avowedly hostile to his own. The slave interests of the State would be destroyed, because it would have no more power or right to capture a slave found in a free State than it had in Canada. The owners of slaves might either remove with them to the South or sell them; in either case, in a few years Missouri would exhibit the spectacle of breaking up its most important relations to the old Union in order to enter into a slaveholding Confederacy, and yet be without slaves itself. How glorious would be the mission of Missouri, therefore, to aid in arresting the progress of revolution, and restoring peace and prosperity to the country.[1]

But there was strong secession element in the State, which found utterance in many propositions, chief of which was that if the Federal Government began war with the seceding States, Missouri would join them.[2] A stronger element, however, denounced secession as a heresy,[3] and declared that it would never countenance or aid a State in making war on the general government, nor on the other hand, furnish men and money

1 Report of Committee on Federal Relations, Journal, 55, 58.

2 Journal, 80. The secessionists were led by the Governor, Claiborn F. Jackson, and were strongest in the rural districts, but had an aggressive minority strength in St. Louis. Jackson and his adherents in the Legislature, and out of it, left nothing unturned to take the State over to the Confederacy. Its Government passed many acts to aid the State in this course. The contest began early in Missouri; and for nearly three years the State was one of the most tangled local, military and civil problems with which the President had to deal. For an extended account of these military affairs, see Nicolay and Hay's Lincoln, IV, 206, 227, 397-413; VI, 369, 399.

3 Journal, 85.

to sustain the Government in attempting to coerce a seceding State.[1] Let it not be forgotten, said a member, that forty millions of slave property in Missouri must be protected. Men might talk at will about principles and theories of government, and about slavery in the Territories, but a man who had labored a lifetime to build up a fortune, and had half of it in slave property, would not rest satisfied a moment without sufficient guarantees that he could lie down at night and sleep in quiet and safety, knowing that no robber dared take his property from him.[2] Secession was founded upon ambition and selfishness. Did not the merchants of Charleston believe that in case South Carolina could be supported by the Confederacy, the city, in the course of ten years, would become a rival to New York? Had not the merchants of Savannah, Mobile and New Orleans the same delusion, and was it not entertained by some of the merchants of the West, and, among them, those who believed that in case the Southern Confederacy was formed, Missouri must go with it and St. Louis thereby become the chief city on the continent?[3] As in Virginia, and other slaveholding States, public opinion in Missouri was, at this time, firm that the national government could not coerce a State, and the fears of the slaveholder for his property, and the theories of State sovereignty and secession were appealed to as an argument for independent action.

In Missouri alone the slaves were valued at nearly one hundred million dollars.[4] So vast an investment, it was thought by many, anchored the State to the Confederacy. But what reason had Missouri to secede? It had no grievances against the general government;[5] therefore,

1 Journal, 61.
2 Journal, 71.
3 Journal, 86.
4 Journal, 105.
5 Journal, 108.

let it be neutral. Its area was sufficient for an empire, and adjoining States might unite with it in forming a Republic of the West. Certainly, if the old Union was to be dissolved, the State must look out for its own interests. Missouri, it must be remembered, was a sovereign.

Moreover, was there not another interpretation of the situation? Who did not know that, for years, there had been growing up in the Southern mind a system of tyranny in public opinion, which had put down every man who presumed to question the will of the dominant party on the subject of slavery? This tyranny was now in the possession of the greater part of the South. It had formed a slaveholding Confederacy, whose purpose was dominion. If Missouri, with its small slave population, was made a member, was it not clear that the white population would be driven off and that more would not come to the State for the purpose of manufacturing, or even for farming, when they knew that the State would be subject "to the cotton lords of South Carolina and Louisiana?" [1]

Perhaps no word, in the lexicon of American constitutional government, has been more zealously discussed than the word "compact." There were those in Missouri at this time who thought it an inadequate expression for the government of the United States; a federation, or compact existed before this government, but the Union was more than a compact. The Constitution of the United States was made, by its people, as one community.[2] But this notion was

[1] Journal, 122.

[2] The long discussion that followed, on the nature of the National Constitution, was a free quotation from the debates in the Convention of 1787; both the advocates of State sovereignty and of National sovereignty thought that discussion of the Constitution in the Convention proved the truth of their theories. See the Journal, pp. 153, 160.

rejected by many in the State, who declared that when the Constitution was formed the American Commonwealths were each as sovereign and independent as Russia is to-day.[1] The whole controversy turned on the meaning of sovereignty. The North introduced doctrines and purposes that would not be satisfied until slavery was under a process of extinguishment. Yet the sagacity of the Northern leaders must be admired. The Union consisted of fifteen slave, and eighteen free, States, with territory sufficient for fifty more. The territories were open to a foreign population, and it was ever anti-slavery. If slavery was confined to the limits of fifteen States, and the immense territory extending to the Pacific was to be peopled and brought into the Union as States, while a foreign emigration was pouring in equal to a State a year, it would not be long before the free States would have a majority of three-fourths of the Confederacy, and the abolition of slavery would soon follow.

Abolition meant the loss of one hundred millions of property to Missouri alone, so that the State might well pause before deciding on its action. The discussion of slavery, that followed, reiterated the familiar apologies for the institution; reviewed the effects of emancipation in Jamaica in 1836, and, in brief, re-echoed all that had recently been said on the subject in South Carolina and the older slaveholding States. The question in Missouri was whether to join the Southern Confederacy or to remain loyal to the Union, or to take the initiative in the formation of a Confederacy of the West, with Missouri as the foremost State.

[1] Journal, 131. For an account of the idea of sovereignty, 1776-1800, see my Constitutional History of the American People, 1776-1850, I, Chapter vi. See also, for application of the idea later, II, 330, 347.

Though hesitating to join the Southern Confederacy, because its own portion of the population would be relatively slight, the State at this time had no disposition to deprive itself of its slaves. Its white people, who were slave owners and advocates of slavery, like their kind, North and South, believed that slavery was the sole means of preventing the negro from hopeless deterioration, but now, when civil war was raging, the instability of property in slaves disclose, and the abolition of the institution not improbable, the ultimate consequence of so radical a change in society did not escape attention. What, it was asked, was to be done with the African when he was free? The party in power at Washington only said that he ought not to go west of the Mississippi. It did not propose to admit him to any participation in political power.[1] It was the anomalous condition, in which liberated Africans would be left, that staggered the majority of the Southern slaveholders. Abolition meant more than bodily freedom. Clearly it involved the gravest civil and political privileges. More than this, it involved the admission of negroes into the ranks of industry as competitors for the rewards of labor.

It is not strange, then, that the mere intimation of abolition made loyal slaveholders pause. The change was a revolution too great for the mind to grasp. Missouri, at this time, like other border States, was inclined to look upon the Southern Confederacy as a scheme of the leaders in the Gulf States to secure a policy of free trade: the glittering temptation of a Southern republic, whose basis was cotton and whose policy was free trade with Europe.[2] The idea, it was said, started in South Carolina, with McDuffy, Calhoun and Hayne, in the hope of establishing

[1] Journal, 195.
[2] Journal, 211.

a Southern commerce as a rival to the centralization of trade in New York.[1] The Northern idea was different and was based on free labor, to which the great West should be the outlet. There was the seat of continental power. In the history of free labor in America, the slave agitation would be only an incident. It was the West, the people of the Great Valley, who should determine the future of America; therefore, the border States better cling to the old Union.[2] Meanwhile, let the war go on: in the course of twelve months, or, perhaps, of two years, Missouri could determine whither she ought to go. Her course should remain unpledged, but whether northward or southward, was now the question.[3] Looking southward, the people of Missouri saw a Confederacy established by the cotton States and levying a tariff much lower than that fixed by the national government.[4] If the Confederacy maintained itself, as it promised to, might it not be advantageous for Missouri to join itself to a government whose system of taxation was less onerous than that of the United States? Thus on the twenty-second of March, 1861, when the convention adjourned till December, the future course of the State, whether Northward or Southward, was quite uncertain.

But Missouri had condemned secession,[5] and military

[1] See the letter to President Jackson respecting McDuffy; Vol. II, p. 405; also see the citation of the opinion in Alabama respecting Southern trade in the Confederacy outrivaling that of New York, infra, p. 42.

[2] Journal, 213, 214, 222, 223.

[3] Journal, pp. 226, 227.

[4] See an Act to Provide Revenues from commodities imported from foreign lands, in Acts and Resolutions of the Second Session of the Provisional Congress of the Confederate States, held at Montgomery, Alabama, Richmond, 1861. Approved May 21, 1861: pp. 50, 62.

[5] See resolution Judge Breckinridge, offered March 7, 1861; Journal, p. 27; Turner's resolution March 8, Journal, p. 31; report

events in the State soon sustained this decision. At the call of a majority of the committee of the convention, it reassembled in the city of Jefferson, on the twenty-second of July. The great State officials had identified themselves with the Confederacy. The convention now promptly declared their offices vacant;[1] passed many ordinances in support of the national government and the loyalty of the State, and concluded its work, on the thirty-first of July, by electing Hamilton R. Gamble, Governor.[2] The vote, more than three to one in his favor, fairly represented the Union sentiment of the State. The Richmond Congress, on the twenty-eighth of November, admitted Missouri into the Confederacy, (and, on the following day, entitled it to elect thirteen members to its House of Representatives.[3] But the persistent efforts of the Confederacy to secure the State resulted, at last, only in failure.

In October the convention had again assembled at St. Louis, and on the fifteenth Samuel M. Breckinridge gave expression to the opinion of the majority of the people of the State in a series of resolutions denying the right of secession, and, generally, sustaining the national government; but, at the same time, demanding the renunciation of any purpose, on its part, to interfere with slavery in Missouri or in the District of Columbia, or with the inter-state slave trade; or of any purpose to use its power to repress or to extinguish slavery. On the other hand,

of committee on Federal relations, Journal, p. 4; the vote that the people of the State were devotedly attached to the Union was practically unanimous,—ninety yeas.

1 Journal of Missouri State Convention held at Jefferson City, July, 1861, p. 11.

2 By a vote of sixty-eight to twenty-one. Journal, 132.

3 Acts and Resolutions of the Fourth Session of the Provisional Congress of the Confederate States, pp. 3, 4.

the resolutions demanded the renunciation by the South of any purpose to use the power of the general government to perpetuate and extend slavery.[1] Judge Breckinridge appealed to the border States, to North Carolina and to Arkansas to stand firm with Missouri in these demands. Thus, the State, finding voice in the words of its loyal citizens, was at this time still hoping for some national adjustment of the contest. On the second of June, 1862, the convention was reassembled by Governor Gamble,[2] and on the seventh Judge Breckinridge presented an ordinance to amend the State constitution.[3] All negroes and mulattoes born in slavery, in the State, after the first of January, 1865, should be considered slaves until they arrived at the age of twenty-five years, and no longer, unless permanently removed from the State.[4]

No description of the South in the year 1862 was a more correct analysis of its condition, and a truer prophecy of its future than the speech in which he supported his amendment. The institution of slavery in Missouri was doomed; the war had already settled its fate. The number of slaves removing from Missouri had suddenly increased, and the number brought into the State had, as suddenly, decreased every year. Within the preceding eighteen months, at least fifty thousand had left. Within a year six thousand had gone to Kansas, and thirty thousand had been removed by their owners into the South for safety. The geographical position of the State ex-

[1] Journal of Missouri State Convention, held at the City of St. Louis, October, 1861, p. 70.

[2] Journal of the Missouri State Convention, held at the City of Jefferson, 1862, p. 3.

[3] Article III, Section 26.

[4] Journal and Proceedings, p. 72.

plained all this. Its white population increased at a far higher ratio than its black. The result was evident and, clearly, a matter of time; and over this result, the people of Missouri had no control.

Judge Breckinridge had not voted for Lincoln, and did not now endorse the President's opinions; he spoke only as a citizen of the State when it was surrounded by dangers. Missouri must settle the question for herself. It was for her welfare that he proposed the constitutional amendment. The choice was gradual, or immediate, emancipation; and the burden of proof rested with others to maintain that the first was not preferable, and that by its adoption, the shock to the State would be less. At the end of twenty-five years, the free negroes should be taken from the State by the general government and removed to some locality, which they could make their country and their home. His plan should be submitted to the people for approval. A tide of immigration was flowing into the State. Its natural resources were illimitable. Slavery would prevent immigration, and the State would suffer.[1] Its debt, already twenty-four millions, was a burden, crushing it to the earth. Attract to it a population accustomed to all kinds of skilled labor, and the State would speedily assume the highest rank in the Union. The choice open to the State was, either gradual abolition and prosperity, or, immediate abolition, as the result of the war, without compensation from the general government, but

[1] The ideas of Judge Breckinridge of the disadvantage of slavery to Missouri are in contrast with the arguments for the advantages of slavery to a State, heard in Kentucky in 1849, when it was urged that slavery kept out a very undesirable foreign population. For an account of the opinions in Kentucky (1849-1850) see my Constitutional History of the American People, 1776-1850, II, pp. 151-182.

with the utter demoralization of society and of the industrial interests of the State.[1]

On the thirteenth, a message from Governor Gamble was read, in which he called attention to the joint resolution of Congress, on the tenth of April, offering to co-operate with any State in gradual abolition and largely at the expense of the United States.[2] Commenting on the offer the Governor declared it a proposition of unexampled liberality, calling for courteous response. The President's offer should not be passed over in silence; yet it was well to remember that, at the time the convention was chosen, the subject of federal relations, rather than of emancipation, was in the public mind, and that in electing their delegates, the people of Missouri had never intended, or imagined, that the convention would effect a radical change in the social organization of the State. If, therefore, the delegates were satisfied, that any proposition, on the subject of emancipation, would produce excitement, dangerous to the peace of the State, a resolution to that effect, declining the offer of the government, ought to satisfy everyone, and could not be construed as disrespectful either to the President, or to Congress.[3] Immediately, on reassembling in the afternoon, the convention took into consideration several resolutions on the subject, all of which agreed in declaring it to be the duty of the United States to co-operate and give the State aid, and on the following day, by an overwhelming vote, the delegates formally declared that they were not authorized to take action

[1] Proceedings of the Convention, pp. 72, 82. But the whole proposition was startling in the extreme; it seemed untimely, and it was laid on the table by a majority of nearly three to one. Journal, p. 20.

[2] Journal, p. 227. For the joint resolution, see Statutes at Large, XII, 617.

[3] Proceedings, pp. 227, 228.

on the subject, though fully appreciating the generosity of the general government.[1]

Thus Missouri rejected gradual and compensatory emancipation, and refused to co-operate with the national government on the plan which the President had outlined. Three days after this decision, there assembled, at Jefferson City, about one hundred and seventy-five delegates from the loyal counties of the State, for the purpose of inaugurating an emancipation campaign. They adopted resolutions favoring co-operation with the government, on the President's plan and proceeded to scatter these resolutions over the State, in order to influence the fall elections. When the President appealed to the border States Congressmen to unite in a policy of compensated abolition, the Missouri delegation was divided in sentiment, but the majority gave him no support, in view of what they considered their obligation to their constituents.

But the time for which Lincoln had been anxiously waiting had now come; Antietam was fought, and when the preliminary Emancipation Proclamation was issued, the prospect, that Missouri would again have opportunity to receive compensation for its slaves, daily became fainter. The proclamation itself seemed to awaken the people of Missouri to the situation, and, from the day it was issued, the abolition sentiment strengthened in the State. The November elections proved this. The President's scheme was becoming popular. Two bills were introduced in Congress, one by Senator Henderson of Missouri, on the tenth, the other, on the eleventh, by one of its Representatives, John W. Noell. The first appropriated twenty millions, the second ten to aid Missouri in the abolition

1 See Hitchcock's Resolutions, Proceedings, p. 29; Hendricks's, pp. 230, 231; and, on the 4th of June, the Resolutions of Judge Breckinridge, which were adopted by 37 to 33, p. 252.

of slavery. On the sixth of January, Noell's bill passed, and, in the Senate, superseded the Henderson Bill. The debate turned largely upon the amount to be appropriated, and, on the twelfth, it was compromised at fifteen millions.[1] The chief objections to the measure were the right of the United States to undertake a task which it was claimed properly belonged to a sovereign State; and the inability of Missouri, because of its heavy public debt, to raise the necessary co-operative funds,—at least twenty millions of dollars.

The Missouri legislature discussed the subject, but reached no practical conclusion. Thus both in Congress and in the State, the whole matter remained only a proposition. Had the Missouri legislature promptly acted and shown a willingness to co-operate with the government, it is probable that the President's plan of compensated emancipation would have been tried. Thus at the close of the year 1862, no State had taken active measures to abolish slavery. The President's September proclamation was the one emancipatory act of the year. In the great movement of abolition, the national government had taken the lead.

Missouri was not included within the area affected by the Proclamation. Though its military and civil affairs were in an almost hopeless maze, and were giving the President much anxiety and labor, the State was at heart true to the Union, and its population, long suffering from sudden invasions, from the atrocities of guerrilla bands and from enemies in their midst, were swiftly moving to

[1] Noell's Bill passed by a vote of 73 to 46 in the House, and amended in the Senate by a vote of 23 to 18. The speeches of J. S. Rollins and E. H. Norton of Missouri, in the House on the 28th of February, give a good idea of the opinions in the State on the subject. Appendix to the Congressional Globe, Third Session, Thirty-seventh Congress, No. 2, pp. 143-151.

a correct conclusion of the whole matter. On the fifteenth of June, the State again met in convention at Jefferson City, under the call of the Governor, for the express purpose of consulting and acting upon the subject of emancipation.[1] In his message to the general assembly, Governor Gamble had expressed himself as having long entertained the opinion that the material interests of the State would be promoted, and its resources more rapidly developed by the substitution of free, for slave, labor. The condition of the country made action necessary. The Governor had recommended a scheme of gradual emancipation to the legislature, but it was prohibited by the constitution[2] from passing any law for emancipation without the consent of their owners and without full compensation. The finances of the State made it impossible to offer compensation, and there was no longer hope that the United States would co-operate by furnishing the money. What the legislature could not do, the convention could do, because it could amend the constitution.[3]

On the first day, an ordinance was offered by Charles F. Drake, of St. Louis, for the emancipation of all slaves in the State, on the first day of January, 1864; for the perpetual prohibition of negro slavery after that date; and for a system of apprenticeship, to continue until the emancipated blacks were prepared for complete freedom. The ordinance should be submitted to the people for ratification.[4] On the second day, a permanent committee on

1 Journal of the Missouri State Convention, held at Jefferson City, June, 1863, p. 3.

2 Constitution of 1820, Article III, Section 26. For an account of the controversy that grew out of this Article, see my Constitutional History of the American People, 1776-1850, Vol. I, Chapter X.

3 Journal, 1863, pp. 5, 12.

4 Journal, p. 12.

the subject was elected, consisting of a member from each of the nine congressional districts of the State. Reluctance to support some general plan of emancipation had quite disappeared, and six ordinances for emancipation were submitted during the first day. Though differing in details, they agreed in general outline with the plan adopted and tried during the first half of the century in Pennsylvania, New Jersey and New York. The process should be gradual, but when should it end? Judge Breckinridge, on the fifteenth, proposed a plan, beginning on the first day of January, 1864, and culminating in universal freedom on the fourth of July, twelve years later. Another plan would begin in 1869; would exclude slaves and free negroes from the State, and would forever deny those within it the right to exercise the elective franchise.[1] Another plan would exclude slaves from the State, decree emancipation from the fourth of July, 1870, and adopt a system of apprenticeship; while still another plan would date the ordinance of freedom from July, 1876, until which time slavery should continue, but meanwhile no slave should be brought into the State, and the question of abolition should be submitted to popular vote.

The Committee on Emancipation reported a plan for slavery to cease in the State on the fourth of July, 1876. It enfranchised all slaves brought into the State, and all removed by their owners to any seceding State, who should be brought back by them, but the old constitutional provision should continue,—forbidding the general assembly to emancipate slaves without the consent of their owners. Of this committee, Governor Gamble was chairman. One recalcitrant member brought in a minority report, objecting to any ordinance that was not submitted to the people for ratification, and also objecting to the long period of

[1] Appendix to the Journal, pp. 8 to 13.

slavery proposed by the committee's plan, and to its humanity in longer suffering the sale of slaves.

We are interested in the ideas discussed at this time rather than in the opinions of any delegate, however eminent. The abolition of slavery in America was not the work of any one man, and the discussion in Missouri is interesting, chiefly because it occurred in a slave-holding State, the first seriously to take up the subject. Few of the members were life-long emancipationists, but many now confessed themselves abolitionists, than which no more hateful word had for years been spoken in the South. But the war had been a great educator. Slavery was now generally believed to be at the bottom of the rebellion. As one member[1] expressed it, the leaders of the Southern Confederacy had a "widespread, long-formed, deliberate purpose to build upon slavery a mighty empire, which, beginning its march on the shores of the Gulf of Mexico and spreading first westward and southward, should, in the course of years, as it gained establishment, influence and power, turn northward to invest slavery, forever with 'the mastery of this whole continent.' "[2] In Missouri, slavery had shown itself more rapacious and relentless than in the other border States. South Carolina, by her ordinance of secession, attempted to make the institution the corner stone of the Confederacy.[3] The institution was doomed to extinguishment. The President's proclamation, the result of resistless necessity laid upon the United

[1] Charles F. Drake of St. Louis.

[2] Proceedings, p. 25. For a corroboration of this idea of the territorial expansion of the South, see Smith's Debates, Alabama Convention, 1861, pp. 236, 237.

[3] The reference is not alone to the debates in South Carolina Convention of 1861, but to part of Alexander H. Stephens' "Corner Stone Address" at Savannah, Georgia, March 21, 1861; see Johnston's American Orations, III, 164.

States to crush its intestine foe, had fallen like a thunderbolt, and put an end to slavery within the States in rebellion. There it could never be resuscitated. It lived in the loyal States only till their people, by their own peaceful action, could do for it among themselves, what the President, by warlike means, had done for it, elsewhere. It was the institution itself, as a crime, that had fostered passion and rebellion, and to leave it standing on any spot in the country was only to prepare the way for future revolution. At last, the people were beginning to understand this, and were willing to abandon slavery to its fate, and save their country.

The recent movement in West Virginia might be considered, in some sense, as a precedent. Since the war continued, and Missouri was a slave State she, for that reason, would be subjected to incursions from without and to convulsions within, crippling her energies and wasting her resources. The instances of emancipation earlier in our history were from times of peace. There was no similarity of condition between Missouri in 1863 and the older States from 1780 to 1817, which had adopted a system of gradual abolition. Pennsylvania, New Jersey and New York had the whole case within their own grasp, free from external pressure; but outside circumstances, over which Missouri had no efficient control, created the exigency which called for emancipation. The course of the older States could not, therefore, be a precedent for Missouri. They could set their own time, to put an end to the institution; Missouri, for its own peace and safety, must act at once, if it would not be placed "forever in the hold of Southern traitors." It was time to "free her from the curse of home-bred treason." The institution constantly tended to a society of few whites and many slaves. Missouri had gained nothing by its existence within her borders, and

could gain nothing by its continuance. Illinois, by free labor, had greater agricultural products. Ohio, a free State, increased more rapidly in population. In each of these free States railroads were more extensive than in Missouri, and were maintained at far less cost.

Though Missouri offered public lands at one-half the price charged in Illinois and Iowa, immigrants sought the free, and avoided the slave, State. The want of Missouri was population, for which all the products of slave labor could not make up. Put away slavery and the State would rank with the first in the Union. Already slavery had taken alarm, and from the central part of the State, slaves were being moved into Kentucky, ostensibly to be employed in raising cotton, but, really, to escape emancipation. Every day the State was losing its laborers, and no man could tell when the exodus would cease. It was the young, and the vigorous, middle-aged men that were departing, leaving the old men, the women and the children to be cared for by their masters. What was to stay this movement? With war imminent; with society so disrupted that pursuit of fugitive slaves was, beyond any precedent, of doubtful result; with every road beset with marauders and murderers,—it was notorious, that slaves possessed facilities for escape never known before, and that they were availing themselves of them. Unless some barrier was interposed, the State would lose its agricultural laborers. It was not in a condition to employ force as a barrier, therefore, the inducement to the slave to secure freedom by flight should be removed, by making him free. Yet, it was not from Missouri they were flying, but from slavery; it was not Illinois, Iowa or Kansas they were seeking, but freedom. Emancipation was, therefore, an industrial question. It was to the interest of the State to keep its laborers at home. It would take years to obtain

a substitute for this servile population of a hundred thousand souls.[1]

Clearly, it was a simple matter of political economy to keep the negroes until their places could be filled by white laborers. If the slaves understood that they were to remain in servitude for an indefinite period, they would continue to flee. Two years of war, for the extension of slavery, had done more for its extermination than all the efforts of the abolitionists for a quarter of a century. Yet, they must not be emancipated without a system of apprenticeship, for they were like children and must be educated into fitness for freedom. Let them work in hope, and they would work well. A proper system of apprenticeship must be the work of the legislature, but emancipation should be immediate. The President's proclamation had forever destroyed the Southern market for Missouri slaves. The act of Congress, confiscating the property of rebels,[2] practically ruled out most of the slaveowners of the South from being slave purchasers. Of the twenty-five thousand slaveholders in Missouri, it could be said, that they would be far more than compensated for the loss of their slaves by the increased value of their lands, produced by emancipation.[3] It will be noticed that these arguments for emancipation were wholly on industrial grounds. No argument based on the immorality of slavery would prove so persuasive to a Southern convention.

Compensation to slave owners, it was said, the State

[1] The aggregate slave population of Missouri at this time was estimated at 114,931; see classification of it by ages and sex in Proceedings of this Convention, p. 53; see also census of the State by Counties in the Appendix to the Journal of the Convention of 1862, pp. 30, 32.

[2] July 17, 1862; Statutes at Large, XII, 589, 627; also p. 319.

[3] Proceedings, pp. 26, 36.

was under no constitutional obligation to make, as its resources forbade it. Compensation could only mean "long continued, and most grievous taxation." Had any one proposed to reimburse the State for the ravage, destruction and misery she had endured through the efforts of disloyal slaveholders to drag her out of the Union? When Missouri had balanced its account with slavery, the people would see little difficulty about compensation. The handwriting was on the wall; the loyal people of Missouri had written the doom of slavery; it could no longer be defended. There was nothing for the State to do other than to emancipate her slaves.[1]

But had the convention power to free the slaves? Under the constitution, the legislature could not do this; but the general assembly had failed, by one vote, to pass the act calling a State convention, for the purpose of taking the subject of emancipation into consideration, and the members of the present convention had been elected nearly two years and a half before, when the subject was not an issue at the polls.[2] No one denied that the members of the convention were entitled to their seats, and it was understood that the assembly had failed to pass the act, because it had been taken up out of its order. If the convention was disposed to pass an ordinance of emancipation, could there be any doubt, now, that it was acting in accordance with the will of the people? Certainly, it was within the

[1] The Speaker, Charles Drake, of St. Louis, had long been opposed to emancipation, but said he became an anti-slavery man "after our National flag was lowered, but not degraded at Sumter." Journal of Proceedings, p. 24.

[2] On the 18th of March, 1863, the Missouri Senate, by a vote of seventeen to fifteen, passed a resolution calling a convention to take up emancipation, and on the same day by a vote of seventeen to fourteen in favor of full and final emancipation in the year 1900. The measure failed in the House by a single vote. Senate Journal, pp. 457, 468; House Journal, pp. 602, 608.

convention's powers for these differed essentially from those of a legislature.[1] A convention could modify the organic law of the State. The discussion of the powers of the convention was, however, very brief, for the majority of its members were convinced of their authority to act. The question, therefore, must be discussed on its merits.

Judge Breckinridge, a year before, had submitted a plan for gradual emancipation, the first of its kind proposed in a slaveholding State,[2] and had earnestly supported it in one of the ablest speeches on the subject on record. He now renewed his plan, slightly modified, and again defended it with equal power and ability. He pointed out that emancipation must be speedy, yet gradual. It must apply to the slaves in being, as to the after-born; must be framed without reliance upon compensation, and must be free from any provision for the removal of the black race from the State,—leaving that to future legislation.[3] Though by the United States census, there were nearly one hundred and fifteen thousand slaves in Missouri, in 1860,[4] there were now less than seventy-five thousand. Of the white population of the State, less than

[1] For Northern and Southern views of the powers of the Constitutional Convention, see 75 Pennsylvania State Reports, p. 205 (1873), and 69 Mississippi State Reports, p. 898 (1892). For a discussion of the subject, see Jameson's Treatise on Constitutional Conventions, Chapters VI and VII. For the bibliography of Constitutional Conventions, their Journals and Debates, and a general account of their work, see The Constitutional History of the American People, 1776-1850, Index, Constitutional Conventions.

[2] June 6, 1862; see Proceedings of the Convention of that year, pp. 72, 82.

[3] For the Breckinridge constitutional amendment, see Proceedings, p. 36. It abolished slavery from and after January 1, 1864, and established a system of indentures for negroes until July 4, 1876.

[4] 114,931.

one person in forty-three was a slave-owner.[1] It might confidently be claimed that land would double in value as the result of emancipation.[2] This increase would go far to pay for any loss. Further compensation was impossible, because the State debt was already near its constitutional limit.[3]

But, it might be asked, if the convention could amend the constitution, so as to abolish slavery, could it not also amend it so as to increase the power of indebtedness? The two propositions, however, were quite different, for the people would not tolerate an increase of the debt, or higher taxation, and they would abolish slavery in order to prevent further depreciation of property. There was a general and strong desire on the part of all slave-owners, that negroes, when free, should be removed to some other part of the country, yet at this time they were excluded from every slaveholding State, and from nearly all the free States.[4] A Southern man would tolerate a negro slave, but not a free negro; a Northern man might endure a free negro, but would not tolerate a slave. Many feared that, if the remaining slaves in the State were emancipated, they would become violent, and demoralize society; yet their number was so great they could not be removed at the expense of the State, nor be driven out by force. Yet, if all remained, there would be less than eighty thousand free blacks to more than one hundred and ten thousand whites.

1 24,632 out of 1,038,150.

2 Proceedings, p. 44.

3 The debt of $26,635,000, which with interest overdue and accrued July 1, 1863, amounted to $30,787,180. The State Constitution of 1820, and the amendment of 1859, limited the public debt to $30,000,000, "except to repel invasions or suppress insurrections, or civil war."

4 See my Constitutional History of the American People, 1776-1850, Vol. I, Chapter xii, "A People Without a Country."

There is danger, when we attempt to understand the opinions and feelings of the Southern people, in the border States in 1863,—of taking a *post-bellum* attitude, and of writing the opinions of to-day into the records of that time. We must remember that, while Missouri was studying the great and untried problem of emancipating nearly one hundred thousand negroes, the thought of her people turned toward Delaware, Maryland and Virginia, where the largest number of free blacks were found.[1] In these States there was prejudice against them. Usually they were paupers, and a serious charge on the community in which they lived. Though their number was great, it had been reached gradually, so that society had had time to adjust itself to the existing state of affairs. Missouri could guard against the evils complained of in Maryland and Virginia, only by a system, so regulated and graduated, that the enfranchised blacks might be tolerated, even though they were in larger numbers, relatively to the white population, than in any other State. Again, it must be remembered that the white race was increasing faster than the black; therefore, the evils of emancipation, of which there would be an increasing number of cases, would be greater than at any future period. But, even if the war soon came to an end, would slavery come to an end also?

One sign of the times was clear to all: the President's proclamation, and the confiscation acts of Congress were making the tenure of slave property so precarious as to deter prudent men from investing in it. Every negro of the State, of ordinary intelligence, knew that his freedom

1 In Delaware, in 1860, there were 18,929 free blacks to 90,925 whites; in Maryland there were 83,942 free blacks to 515,918 whites; in Virginia, 58,042 free blacks to 1,470,000 whites. These were the figures cited in the Missouri convention, and though they vary from the census slightly, they must be taken as the evidence set before that body.

was the topic of discussion. The race was getting restless. Never again could the old ideas or the old relations be restored. The war had dislocated slavery; the State must make a new adjustment of the affairs of the race. This could best be done by a system of gradual emancipation and indentured apprenticeship. Twelve years were none too long for the change. The practical difficulty of ascertaining the age of negroes made it necessary to treat all alike. If some were freed and others kept in bondage, families would be separated, and new aggravations of discontent would follow. Laws securing a humane system of apprenticeship would differ but little from those already in force regulating slavery. Fugitives would be returned, and those who induced them away would be punished. Of course, the details must be left to the legislature, but the whole scheme was, essentially, one of education for the benefit of the black race.[1]

Yet, if Missouri should adopt a constitutional amendment, providing for gradual emancipation, could it carry it out unaided by the general government? Ought not a pledge to be secured from the President, that he, or the federal authorities in the State, would respect and execute the ordinance in good faith? To ask a guarantee from the Federal Government to insure a respectful observance of the action of the State, by federal authorities, might seem, to some, unbecoming the representatives of a free people, in a sovereign State.[2] Nevertheless, without the co-operation of federal and State authorities, the attempt to carry out any system of gradual emancipation might not only be a disgraceful farce, but a practical failure. The question was a grave one. Federal troops in Missouri were aiding in executing the laws of the State,

[1] Proceedings, pp. 46, 52.
[2] Proceedings, p. 158.

and of the United States, respecting slavery. But if the emancipation ordinance was passed, would the federal army return a negro to his master, when other runaway slaves were enlisted as soldiers? In brief, would the national government help carry out the emancipation program? The question raised by the convention was soon definitely answered by the President himself in a letter to General Schofield:—

Desirous as was Lincoln that emancipation should be adopted by Missouri, and believing as he did that gradual could be made better than immediate emancipation, for both black and white, except when military necessity changed the case, his impulse was to say that such protection would be given. But the President could not exactly know what shape an act of emancipation might take. If the period from the initiation to the end should be comparatively short, and the act should prevent persons being sold during that period into more lasting slavery, the whole would be easier. He did not wish to pledge the General Government to the affirmative support of even temporary slavery, beyond what could be fairly claimed under the Constitution. He supposed, however, that this was not desired, but that it was desired that the military force of the United States, while in Missouri, should not be used in subverting the temporarily reserved legal rights in slaves during the progress of emancipation. This, Mr. Lincoln would desire also. He had very earnestly urged the slave States to adopt emancipation; and it was an object with him not to overthrow or to thwart what any of them might do in good faith to that end.[1] The President's reply to Schofield was given before the question it answered was raised in convention, and when its purport was made known to the members (for the letter itself was

[1] Lincoln's Works, II, 357.

not, at the time, made public), it contributed to hasten the adoption of the emancipatory plan.

When its contents were known the main question with the convention was, merely to fix the date when complete emancipation should begin. Only a small minority favored immediate emancipation. Much was said of the contrast between Missouri and the larger free States. Its production of pig-iron was less than that of Pennsylvania, Ohio, New York or New Jersey. Its tons of bar and other rolled iron scarcely compared with the quantity produced in them. In 1860, it produced less than eighty thousand bushels of coal, while Illinois produced fourteen millions, and Pennsylvania nearly sixty-seven millions. But emancipation, it was said, would soon bring the State up to the rank of its competitors. This expectation has since been fully realized, and Missouri, instead of ranking eighth in population and wealth, as it did in 1860, before ten years elapsed ranked fifth, and sustained its placed to the close of the century.[1] But no one suggested any participation of the freedman in this vast and prospective accretion of wealth; he should be apprenticed under the law; he should be brought back, if he ran away; he should be kept in constant surveillance, and, at the end of his probationary period, be set free; but no one even hinted that he ought to be taught a trade, or any art or calling. Nothing was said of establishing schools for his benefit.[2] These were details of the plan which the future must work out.

[1] See Statistical Atlas based upon the results of the Eleventh Census, Washington, 1898, Plate 2. The comparison of the productiveness of the State with that of other States was elaborated upon in many speeches, but all to the same end, that emancipation must prove profitable. See Proceedings, pp. 174, 175, 176, 203, 242, 243, 244.

[2] Missouri established a system of schools under the Act of 1839. It was for whites only. It was an offense to teach negro

But let no man imagine that thoughtful men in Missouri were indifferent to the dangers and obligations involved in the constitutional amendment, which the convention now recognized to be necessary. Gradually, as the discussion proceeded, the six plans for emancipation that had been submitted to the convention were composed in the form of a constitutional amendment. On the first of July, the vote on the great question was cast. All differences as to the time when slavery should cease were compromised. On and after the fourth of July, 1870, all slaves within the State should be free, but they should remain subject to the authority of their late owners, as servants, for various periods. Those over forty years of age during their lives; those under twelve years of age, until they arrived at the age of twenty-three, and all other ages until the fourth of July, 1876. Slaves brought into a State, and not now belonging to any of its citizens, should be free, and slaves removed, with the consent of their owners, to any seceded State, and afterward brought back, should also be free; but the general assembly was forbidden, as under the old constitution,[1] to pass laws to emancipate slaves without the consent of their owners. An effort was made to pass a resolution declaring it to be the duty of Congress to compensate owners for the inconvenience which the change involved; but it met with slight support.[2]

slaves to read and write, and free negroes were not suffered to attend school. The educational problem was not touched on by this convention. For an account of educational privileges in the United States down to 1850, and especially as to persons of color, see my Constitutional History of the American People, 1776-1850, Vol. I, pp. 384, 394; also Schools and Education in the Index, Vol. II.

[1] The ordinance passed by a vote of fifty-one to thirty. Proceedings, pp. 367, 368.

[2] Defeated by a vote of thirty-five to twenty-one.

The news of the adoption of the amendment passed quickly over the State, and was received with many evidences of approval, but the signs of approval were less vigorous than those of opposition; not because the amendment was adopted, but because it did not go into effect immediately. The radical emancipationists of the State took up the question, agitated it anew among the people and from this time became an active and controlling party in the State. In the Presidential election of 1864 they elected the governor and a majority of the Congressmen, and got control of the State legislature. The popular vote called for a convention, and three-fourths of the delegates chosen were radical emancipationists. On the thirteenth of February, 1864, the General Assembly had passed the act authorizing the convention, which the people had ratified, and had made it the duty of the prospective body to consider such amendments to the State constitution for the emancipation of slaves[1] as might be deemed necessary.

On the sixth of January, 1865, this convention met at St. Louis. Its membership plainly showed the changes of the last four years in the State. In the convention of 1861, which barely abstained from issuing an ordinance of secession, there were eighty members who were born in slaveholding States and but thirteen natives of free States. In the Convention of 1865 there were thirty-four natives of slaveholding States, but there were twenty-two natives of free States. On the ninth of January, several ordinances for the immediate abolition of slavery were proposed. On the tenth, an article on the emancipation of slaves was offered, beginning "All men are born free and independent," which declared the abolition of slavery. On the eleventh, the committee on emancipation reported

[1] Act of February 13, 1864; Section 5.

an ordinance that hereafter in the State there should be neither slavery nor involuntary servitude, except in punishment of crime whereof the party had been duly convicted, and all persons held to service or labor as slaves were declared free. The previous question was called, and the ordinance taken from the great act of 1787 was adopted by an overwhelming vote.[1]

It was engrossed on parchment, was signed by the members and a copy, duly attested, was placed in the hands of a special messenger and transmitted, without delay, to the Governor, at Jefferson City, with the request that he issue a proclamation to the people stating that by the irrevocable action of the convention, slavery was forever abolished in Missouri.[2] The adoption of the ordinance was announced to the legislature by telegraph. Elated at the news, the House dropped all business for a time and greeted the intelligence by joining in singing "John Brown's Body."[3] The news was sent to other States. Illinois soon sent a congratulatory reply through Richard Yates, her Governor. On the sixteenth, Schuyler Colfax laid before the National House of Representatives the telegraphic dispatch received from Missouri, signed by the President of the Senate and the Speaker of its House, and also the proclamation of the Governor. At the suggestion of Elihu B. Washburn of Illinois the communications were ordered to be preserved in the archives of the government.[4] Meanwhile five other slaveholding States were adopting a policy of emancipation, and a new free State was forming on the Pacific coast.

1 By a vote of sixty to four. Journal of the Missouri State Convention, held at the City of St. Louis, January 6, April 10, 1865, pp. 25 and 26.

2 Journal, p. 27.

3 Nicolay and Hay's Lincoln, VIII, 484.

4 Congressional Globe, January 16, 1865, Second Session, Thirty-eighth Congress, p. 276.

CHAPTER II.

PROGRESS OF EMANCIPATION IN THE STATES.

When the secession movement reached Arkansas it encountered the strong opposition of loyal men who had assembled in the Little Rock Convention,[1] on the very day Lincoln was inaugurated, and who succeeded in defeating a resolution to take the State out of the Union.[2] In his message to the convention, Governor Rector declared that the United States were composed of thirty-three independent sovereignties, each one a judge of its own wrongs and of the mode and measure of redress, and that the right of secession, so implacably assailed, was but the fruit of the American Revolution. He considered the question of the right of compensation "solved by practical demonstration," and declared the question of slavery to be the vital point of the whole controversy between the North and the South. The question for Arkansas to determine was, whether she would join her sister States of the South, with whom she had a common interest, and with whom she had a common destiny, or turn her eyes North to Missouri, Kentucky and Maryland and the eighteen abolition States, for sympathy and protection. Certainly not northward. In the past, fifteen Southern States had failed to protect slavery; how, then, could the remaining eight accomplish that object by adhering to the Union? "Cotton is king," said he, "and it would open a channel of commerce to every portion of

[1] See Act of January 15, 1861, calling the convention, in the Journal.

[2] The Journal of both Sessions of the Convention of the State of Arkansas, which were begun and held in the Capitol in the City of Little Rock. Little Rock: Johnson and Yerkes, Printers, 1861; 509 pages.

civilization, free of cost to the country which produced it; would release all the fishery bounties paid by the general government to the Northern States exclusively,—the tax on iron given Pennsylvania, as a peace offering and gratuity,—the annual loss of slave property abstracted by the Northern from the Southern States; for it might readily be perceived that a confederacy of the slaveholding States would be less expensive to its people than the old Union kept up at an annual expenditure of sixty millions of dollars. The duty of Arkansas was plain, but an ordinance dissolving its connection with the old Union should be submitted to the people for their direct vote.[1]

When, on the eleventh, the convention met, the first resolution of importance declared that negroes and their descendants in slavery in the South were "property to all intents and purposes," under the protection of the Constitution of the State and of the United States, and that the denial of the right of property in slaves was a sufficient cause to dissolve the Union.[2] As the session continued, resolutions of the import common to the ordinances offered in the Southern conventions of the time were proposed, and among them, one declaring the Union a compact. They accused the Northern States of violating the Constitution and the laws of the United States. They asserted that the inauguration of the Lincoln administration by vote of sectional majority was an indignity to the Southern States, of which they justly complained, and that any attempts on the part of the general government to coerce a State would be resisted by Arkansas to the last extremity.[3] The majority of the delegates, however, were Union men. They preferred the old government, provided it

[1] Journal, Governor's Message, March 2, 1861, pp. 41, 49.
[2] Journal, Robinson's Resolution, p. 51.
[3] Journal, Hawkins's Resolution, Turner's Resolution, pp. 52, 55.

could be continued upon a basis that would recognize the rights of every State in the Union, South as well as North.[1] On the thirteenth, a secession ordinance was introduced, but the convention refused to adopt it. Meanwhile, the provisional Confederate government at Montgomery had sent a special commissioner to the State to urge its secession.[2] On the eighteenth, the commissioner was received, and on that day, a second, and amended, secession ordinance was proposed. The Union delegates wished to submit the whole question to popular vote,[3] and one of them offered an ordinance to that effect as a substitute. A parliamentary struggle ensued with the result that the convention adjourned without acting on the great question. Not until May did it meet again, under call of its president, and, meanwhile, the sentiment of the State had greatly changed. As David Walker, the president, expressed it, "Hope had vanished, the Constitution had been violated, Sumpter had been fired on, the Union sentiment in Arkansas had been completely changed, the South had become a unit; the State must secede."[4] Passion ruled the hour, and the ordinance of secession now was passed, almost unanimously.[5] But the convention was not the State. At heart, a great body, though probably not the majority of its citizens, were loyal to the Union. But industrially as well as geographically, Arkansas was nearer to Montgomery than to Washington.

[1] A. H. Garland's Resolution, Journal, p. 63.

[2] William S. Oldham, a delegate in the Confederate Congress from Texas, commissioned by Jefferson Davis, Journal, pp. 74, 75.

[3] Journal, p. 85.

[4] Journal, pp. 117, 120.

[5] See the "Ordinance dissolving the Union heretofore existing between the State of Arkansas and the other States united under the compact and known as the Constitution of the United States of America," which "at ten minutes past four o'clock was declared adopted," and passed by a vote of sixty-nine in the affirmative, and nine in the negative; Journal, May 6, 1861, p. 124.

The Davis administration soon provoked animosity and discontent in Arkansas, as it did in North Carolina, and later in Georgia, and there was needed only the active presence of national troops, though not necessarily of a large body, to enable the somewhat dazed loyal population to exercise their rights and wishes. The loyal citizens were lacking political organization and leadership; they were timid, and many were looking to the President for intervention. But Arkansas was a battlefield. The emancipation proclamation applied to the State, and the President urged its loyal citizens to adopt some plan of gradual emancipation, following the precedent of Missouri.[1] He thought the precedent could be much improved, for it postponed emancipation seven years, "leaving all that time to agitate for the repeal of the whole thing."

It was not until August that military movements in Arkansas made it possible for its loyal people to gain control of the State once more; but loyalty follows the flag, and a political reaction immediately set in. The President was anxious for the reorganization of the State government. On the eighth of December he issued a proclamation of amnesty and reconstruction, most liberal and humane, offering full pardon to all persons, with few exceptions,[2] implicated in the rebellion. These were granted full pardon with restoration of rights of property,—except as to slaves. They should take and subscribe an oath of

[1] Lincoln to General S. A. Hurlburt, July 2, 1863. Lincoln's Works, II, 379.

[2] "The persons exempt from the benefits of the foregoing provisions are all who are, or shall have been, civil or diplomatic officers or agents of the so-called Confederate Government; all who have left judicial stations under the United States to aid the rebellion; all who are or shall have been military or naval officers of said so-called Confederate Government above the rank of colonel in the army or of lieutenant in the navy; all who left seats in the United States Congress to aid in the rebellion; all

allegiance, which should be registered for permanent preservation.[1] Whenever in Arkansas and in the nine other States in which rebellion existed, a number of persons, not less than one-tenth of the vote cast in the State at the Presidential election of 1860, who, having taken the required oath, and not guilty of its violation, and also being qualified voters, by the State law in force before any so-called act of secession, should re-establish a State government, republican in form and in no wise contravening the oath, this would be recognized as the true government of the State, and would receive the benefit of the provision in the national Constitution, declaring that the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and against domestic violence on application of the legislature, or of the executive, when the legislature cannot convene.[2]

who resigned commissions in the army or navy of the United States and afterward aided the rebellion; and all who have engaged in any way in treating colored persons, or white persons in charge of such, otherwise than lawfully as prisoners of war, and which persons may have been found in the United States service as soldiers, seamen, or in any other capacity." Lincoln's Works, Vol. II, p. 443.

1 "I, ————, do solemnly swear, in the presence of almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and the Union of the States thereunder; and that I will, in like manner, abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress, or by decision of the Supreme Court; and that I will, in like manner, abide by and faithfully support all proclamations of the President made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court. So help me God." Id.

2 Article IV, Section 4.

The President further proclaimed that any provision which might be adopted by the reorganized State government, in relation to the freed people of the State, which should recognize and declare their permanent freedom, should provide for their education, and yet be consistent, as a temporary arrangement, with their condition as a landless and homeless class, would not be objected to by the national executive. In constructing a loyal State government, the name of the State, its boundaries, its subdivisions, its constitution and general code of laws, existing before the rebellion, were to be preserved, subject only to modifications made necessary by the conditions stated in the proclamation, and to such others, if any, in contravening them, as might be deemed expedient. The proclamation did not apply to States in which loyal governments had all the while been maintained.[1]

About a month later, the President sent to the commanding officer in Arkansas a set of blank-books and other material, to be used in initiating the new government. This was on the fifth of January, 1864, a date which may be taken as the beginning of the era of reconstruction.[2] But the loyal people of Arkansas had already taken the initiative, having chosen a State convention. It assembled at Little Rock on the eighth of January.[3] It consisted of forty-four delegates, claiming to represent twenty-two out of the fifty-four counties of the State.[4] Delegates were expected daily from six other counties. The convention did not claim to represent the people of the State sufficiently to adopt and promulgate a constitution, but claimed to represent the sentiment of the

[1] Lincoln's Works, II, 443, 444.

[2] Lincoln to General F. Steel, January 5, 1864. Works, II, 467.

[3] See Journal of this Convention, January 4-23, 1864, Little Rock, 1870, 58 pages.

[4] Nicolay and Hay's Lincoln, VIII, 414.

greater part of its loyal citizens; therefore it made a new constitution, drew up a plan of civil reorganization, and submitted both to popular vote. The entire action of the secession convention, its ordinances and its organization of the State government, were declared null and void.

On the twenty-second of January, slavery, otherwise than for punishment of crime, whereof the parties should be duly convicted, was abolished. Contracts and indentures should be made with persons of color as in a state of perfect freedom. No term of service should exceed one year, except in case of apprenticeship, which for males, should not continue after the parties had arrived at the age of twenty-one, or for females, after the age of eighteen.[1] The debt of the State, incurred by the secession convention, was repudiated,[2] and an election was appointed for the second Monday in March, when the qualified voters should elect State and county officers, and two members of Congress.[2] The President did not know of this convention, and what it was doing at the time he had written to the district commander, General Steele. He now instructed that officer that "he must be master," but that it would be best for him to "merely help the convention on its own plan." Some single mind must control in the State, else there would be no agreement in anything. Citizens were telegraphing to the President to postpone the election to a later date than that fixed either by the convention or by himself. "This discord must be silenced."[3]

[1] Article V, Section 1.

[2] In Districts, number one and two, according to the Act of January 8, 1861; no election being ordered in District number three, the convention recognized the election of Colonel James M. Johnson as its lawful representative. Schedule, Section 9, see U. M. Rose's Edition of the Constitution of the State of Arkansas, Little Rock, 1891, pp. 243, 276, for the constitution of 1864.

[3] Lincoln to W. M. Fishback, February 17, 1864. Lincoln's Works, II, 483, 484.

General Steele supported the convention, and the election was held on the day it had named. The new constitution was ratified.[1] A loyal Governor[2] and State and county officers were chosen and the new government was formally inaugurated at the State capitol, on the eleventh of April.

Meanwhile, Congress was differing with the President as to the policy of reconstruction, and the newly elected United States Senators and members of Congress from Arkansas were not admitted to their seats. In the proclamation of amnesty and reconstruction, the President had declared that whether the members sent to Congress from a State should be admitted to seats, constitutionally rested, exclusively, with Congress and not, to any extent, with the Executive. When Congress refused admission to the newly chosen Arkansas delegates,[3] they naturally feared that the new State government would not have the support of the administration. Lincoln promptly removed this apprehension and ordered General Steele to give the government and the people there the same support and protection as if the members had been admitted;[4] because, in any event, this could do no harm, while it would be the best that could be done in repressing the rebellion.[5] In

1 March 18, 1864. The election continued three days. The constitution was ratified by a vote of 12,179 to 226.

2 Isaac Murphy, whom the convention had chosen Provisional Governor, who now was elected to the office without opposition, receiving 12,430 votes. The popular vote of Arkansas in the Presidential election of 1860 was 54,053 (5,227 for Douglas, 28,732 for Buchanan, 20,094 for Bell). The total population was 435,450, consisting of 324,335 free, including 144 freed colored and 111,115 slaves.

3 William M. Fishback and Elisha Baxter, United States Senators; T. M. Jacks, First Congressional District; A. A. C. Rogers, Second Congressional District, and J. M. Johnson, Third Congressional District.

4 Lincoln to Steel, June 29, 1864. Works, II, 539.

5 Id.

spite of the action of Congress, in refusing admission to the Arkansas delegates, the State, by its vote, had declared its firm allegiance to the great policy which the administration was carrying out. It was becoming clear that preservation of the Union meant the overthrow of slavery. Arkansas was the first slaveholding State to abolish the institution,—immediately and without condition. It is well to remember that this was a State, not a national act.

The civil situation at the close of 1863 was set forth by the President in his message to Congress. The emancipation proclamation, issued at the opening of the year, had given the future a new aspect. "According to our political system, as a matter of civil administration, the general government had no lawful power to effect emancipation in any State, and for a long time it had been hoped that the rebellion could be repressed without resorting to it as a military measure." The necessity had long been expected, and it came as a crisis in our history. The year had passed; the Mississippi had been opened; the country, still dominated by rebellion, had been divided in distinct parts, with practically no communication between them. Tennessee and Arkansas were declaring openly for emancipation; Maryland and Missouri were only disputing as to the best mode of removing slavery from within their own limits.

Fully one hundred thousand men, who were slaves at the beginning of the rebellion, were now in the military service of the United States, and about one-half of them were actually bearing arms in the ranks. "So far as tested," continued the President, "it is difficult to say that they are not as good soldiers as any." He had issued the proclamation of amnesty and reconstruction under authority amply justified under the Constitution. The obligation of the United States, to guarantee to every State

in the Union a republican form of government and to protect it, is full and explicit. The Constitution does not prescribe a particular way in which this protection shall be exercised. The present case was one of States favorable to republican government under the Constitution, but too feeble to establish it without national aid. "While I remain in my present position," said he, "I shall not attempt to retract or modify the Emancipation Proclamation; nor shall I return to slavery any person who is free by the terms of that Proclamation, or by any of the acts of Congress."

The policy, laid down in the proclamation of amnesty and reconstruction, presented a rallying point around which the loyal inhabitants of the designated States might gather. To whatever extent the plan was indefinite, embarrassments should be avoided and details be left to future developments. Until the people in the contested regions were confident that the insurgent power would not again overrun them, little could be done anywhere for reconstruction.[1] When West Virginia was admitted, Governor Pierpoint and his associates, constituting the official body of the State of Virginia, retired from Wheeling to Alexandria, made it the temporary capital, and deposited there the archives of the State. Congress recognized the Pierpoint government as the true one of Virginia, but most of the State was yet in the possession of the Confederate forces. Virginia may be said to have had four governments at this time: two at Richmond and two at Alexandria.

Though the Pierpoint government[2] had authority over

[1] Message, December 8, 1863, Lincoln's Works, II, 445-456.

[2] The territorial limits in which it pretended to exercise this function were only such as lay within the Union military lines; a few counties contiguous with Washington, two counties on the East, south of Fortress Monroe and the Cities of Norfolk and Portsmouth. Nicolay and Hay's Lincoln, Vol. IX, p. 438.

but a small fraction of the Commonwealth, it exercised the functions of State administration, and, among others, called a convention[1] to assemble on the thirteenth of February, 1864, for the purpose of amending the State constitution. Though it consisted of less than twenty members, this convention promulgated a new constitution on the eleventh of April, by one[2] clause of which slavery and involuntary servitude in the State were forever abolished.[3] But a long and bitter controversy almost immediately sprang up, between the Pierpoint administration and the national military authorities in the State.[4] The President sustained the civil authority of the Pierpoint regime.[5] We shall see that constitutional precedents were practically ignored in Virginia, and it may as well be said here, that though Congress at last refused to recognize the validity of the Alexandrian government, it was that government whose act of ratification of the Thirteenth

[1] Act of December 21, 1863.

[2] Article IV, Section 19.

[3] The clause was adopted March 10, 1864; ayes fifteen, nays one. See the Journal of the Constitutional Convention, which convened at Alexandria on the 13th of February, 1864. Alexander D. Turner, Printer to the State, 1864, 52 pages. For the discussion of the amendment, pp. 17, 18.

[4] The question arose between the civil authorities and the military authorities in Butler about the liquor traffic in Norfolk and vicinity. The civil authorities wished to continue the collection of licenses imposed by the existing Virginia Laws; the military authorities undertook to give a few firms the monopoly of the importations, in order to keep it in better control. Out of this dispute, which involved most important constitutional principles, came many later questions affecting reconstruction in Virginia. For an account of the matter see Nicolay and Hay's Lincoln, Vol. IX, pp. 441, 445. See also Lincoln's letters to General Butler, August 9, December 21, 1864. Works, Vol. II, pp. 619, 621.

[5] See Lincoln's letter to General Butler of December 21, 1864, with enclosure of August 9. Works, Vol. II, pp. 619, 620.

Amendment was recognized as the will of the people of Virginia. The Pierpoint government was the nucleus of loyalty in the State, and the President would not abandon it.

The principle which all along actuated the President to recognize, and so far as possible, to protect loyalty, wherever it might be found, led him, as early as October, 1862, to give a helping hand to Louisiana. By an executive order he appointed Charles A. Peabody, of New York, provisional judge, with authority to hear and determine all cases within the jurisdiction of the District and Circuit Courts of the United States in Louisiana,—the appointment to continue during the pleasure of the President. The provisional court thus established, with its prosecuting attorney, marshal and clerk, was paid out of the contingent fund of the War Department, and its jurisdiction was co-extensive with the city of New Orleans and whatever portion of the State of Louisiana might be under the authority of the United States. It was to take the place of the judicial authority of the Union, which had been temporarily swept away with the secession of the State.[1]

At the November election, Michael Hahn and Benjamin F. Flanders were elected to Congress, and admitted to seats, so that the federal relations of the State were continued. The loyal minority, some of whom had boldly opposed secession in the convention of 1861, had, with unchanged sentiments, kept alive a spirit of loyalty in the State, and were now the nucleus around which a loyal government might be organized.[2] In the following June

[1] Executive order establishing Provisional Government in Louisiana October 20, 1862. Lincoln's Works, II, 248, 249.

[2] The secession ordinance passed January 26, 1861, by 112 ayes to 107 nays. Journal of the Convention, p. 18. Conspicuous among

the President was asked by a committee, claiming to represent the planters of the State, to order an election for the purpose of choosing a State government that should enjoy all the rights and privileges existing prior to the act of secession, and be in full allegiance to the United States. The evident purpose of the request was to enlist the support of the national government to restore Louisiana to its place in the Union, as though no act of rebellion had occurred.

In declining to comply with the request, the President answered that the people of Louisiana should not lack any support within his power to give them[1] for a fair election of both federal and State officers. Though careful not to commit the Government to a false step, the President was intent upon recognizing and aiding the loyal citizens of the State. Early in August, when about one-third of the State was restored to federal authority, the President outlined his wishes. Though he was clear as to what Louisiana should do, it was quite another thing for him to assume the direction of the matter. He would be glad if the State would make a new constitution, recognize the emancipation proclamation, and adopt emancipation in parishes to which it did not apply. While the State was amending its government "it would not be objectionable for her to adopt some practical system, by which the two races could gradually live themselves out of the old relations to each other, and both come out better prepared for the new. Education for young blacks should be in-

its loyal minority was James G. Taliaferro, who refused allegiance to the secession government and the Confederacy, and who, as we shall see, was conspicuous in the reconstruction convention of 1868.

1 Letter of the Committee to Lincoln and his reply, June 19, 1863. Lincoln's Works, II, 35.

cluded in the plan." The power, or element of "contract" might be sufficient for this probationary period; and, by its simplicity and flexibility, might be the better.[1]

Meanwhile a registry of citizens, preparatory to the election of a constitutional convention was in progress in the State, under the authority of Shipley, the military governor.[2] But it was necessary that the convention and the amended constitution should not be the work, merely, of United States officers and troops. In disloyal parishes and among the planters in those occupied by national troops, belief and hope, almost equally strong, would not tolerate the thought of emancipation. When the war was over, would not the institution of slavery be left as it was before? Three months passed, the situation remaining quite unchanged, when the President wrote to General Banks, urging that no more time be lost. Without waiting for more territory, those in charge of the register should go to work and give the President a tangible nucleus, which the remainder of the State might rally around, as fast as it could, and which the President "would at once recognize and sustain as the true State government." Otherwise the adverse element might preoccupy the ground and a few professedly loyal men might draw the disloyal about them, "colorably set up a State government, repudiate the Emancipation Proclamation, and establish slavery." Such a government the President could not recognize. Louisiana would be "a house divided against itself." And again Lincoln declared, that, though his word was given on the question of permanent freedom to the slaves, he would support a plan that made "a rea-

[1] Letter to General Banks, August 5, 1863. Lincoln's Works, II, 380.

[2] See page 35.

sonable temporary arrangement in relation to the landless and homeless freed people."[1]

Though the proclamation of amnesty and reconstruction outlined a policy, the essentials of which were the oath and the loyalty of at least one-tenth of the voters at the Presidential election of 1860, the President later declared, that the proclamation was not a Procrustean bed, to which exact conformity was to be indispensable.[2] Affairs in Louisiana differed from those in Arkansas or Virginia; the labor already done in the State should not be thrown away. Sincere Union men, "each yielding something in minor matters," should be working together. It soon came to light that the trouble in Louisiana was the aggressive conduct of the military governor, and his purpose to use the national troops in the organization of the civil authority of the State, instead of merely for protecting the loyal citizens while organizing it themselves. The President, as soon as possible, overcame this by ordering General Banks to take the situation as he found it, "and give a free State reorganization of Louisiana in the shortest possible time."[3]

As in the case of Arkansas, the President had declared that one mind must rule, so now, in Louisiana, General Banks should be "master in every controversy, as well in recognizing a State government as in military matters."[4] A week later Banks submitted a sagacious plan for reorganizing the State. It showed a large practical understanding of civil affairs, and a nice appreciation of the character of the people with whom he was dealing. They

[1] Lincoln's letter to General Banks, November 5, 1863. Lincoln's Works, II, 435, 436.

[2] Lincoln's letter to Thomas Cottman, December 15, 1863. Works, II, 458.

[3] Lincoln to Banks, December 24, 1863. Works, II, 465, 466.

[4] Id. and letter to Banks, December 29th, Id., p. 466.

should elect their State officials under the constitution and laws of the State, except so much as related to slavery,—which should be inoperative and void. The legislature should provide for a convention, which should take into consideration, with other matters, the question of emancipation. If abolition was made a condition of permitting the loyal citizens to organize their government, it might defeat the whole purpose. "A government organized upon the basis of immediate and universal freedom, with the general consent of the people, followed by the adaptation of commercial and industrial interests to this order of things, and supported by the army and navy, the influence of the civil officers of the Government and the administration at Washington could not fail by any possible chance to obtain an absolute and permanent recognition of the principle of freedom upon which it would be based; any other result would be impossible. The same influence would secure, with the same certainty, the selection of proper men in the election of officers."[1] The great question,—immediate emancipation,—would be covered *ab initio* by a conceded and absolute prohibition of slavery. This plan conformed to the principle that the abolition of slavery rested with the States; it left Louisiana free to adopt abolition; it practically excluded the hateful element of coercion.

The President approved of this practical plan, for constructing a free State government speedily for Louisiana,[2] and gave it his full and zealous co-operation. By a proclamation issued on the eleventh of January, General Banks named the twenty-second of February as the day

[1] General Banks' letter to the President, cited in Nicolay and Hay's Lincoln, VIII, 428-430.

[2] President Lincoln to General Banks, January 13, 1864, Works, II, 469.

when electors in the State, qualified under the President's amnesty proclamation, should choose State officers. The constitution and laws of Louisiana, excepting so much as recognized and related to slavery, should regulate the election. On the twenty-eighth of March delegates should be chosen to the convention for revising the constitution.[1] These announcements were expressed in general military orders, for the State was under martial law; but the commander explicitly announced that, at the earliest possible moment, it was competent and just for the government to surrender to the people as much of military power as might be consistent with the successes of military operations, in order to prepare the way for the full restoration of the State to the Union, and of its power to the people. At the State election nearly twelve thousand votes were cast,[2] of which Michael Hahn, the Free-State candidate, received nearly one-half; and the Pro-Slavery candidate, J. Q. A. Fellows, received about one-fourth. General Banks' procedure greatly displeased the Free-State committee, which, in consequence, nominated its own candidate, who received about one-fifth of the vote.[3]

[1] Official Journal of the Proceedings (English and French) of the Convention, for the Revision and Amendment of the Constitution of the State of Louisiana, New Orleans, W. R. Fish, Printer to the Convention, 1864. In English, 171 pages; in French, 187 pages, with Index, x pages. For returns of the election, reported by the Secretary of State, see pp. 3 and 4.

[2] 11,411. General Orders No. 35, January 11, 1864, cited in part in Nicolay and Hay's Lincoln, VIII, 431.

[3] Hahn received 6,183; Fellows, 2,996; Flanders, the committee's candidate, 2,232. Official returns cited in Nicolay and Hay's Lincoln, VIII, 432. At the Presidential election of 1860 the vote of the State was 7,625 for Douglas; 22,861 for Breckinridge; 20,204 for Bell, total 50,690; the total population was 708,002, consisting of 357,629 whites, 331,726 slaves, and 18,647 free persons of color. Preliminary Report of the Eighth Census, p. 131. Thus the election of Governor Hahn was effected by more than one-tenth of the vote of 1860.

On the fourth of March the new Governor was inaugurated with much ceremony. According to General Banks, his authority was somewhat anomalous. He represented "a popular power only subordinate to the armed occupation of the State for the suppression of the rebellion, and the full restoration of the authority of the government." This was expressed in his oath. He was a substitute for the military governor. In a private letter to Governor Hahn, the President congratulated him on having fixed his name in history "as the first free State Governor of Louisiana." "Now," said he, "you are about to have a convention, which, among other things, will prepare and define the elective franchise. I barely suggest, for your private consideration, whether some of the colored people may not be let in; as, for instance, the very intelligent, and especially those who have fought so gallantly in our ranks. They would probably help in some trying time to come, to keep the jewel of liberty within the family of freedom."[1] Two days later, the President formally invested him "with the powers exercised hitherto by the military governor." This was the first suggestion from President Lincoln, that the right to vote might be given to the negro. It will be noticed that the President considered the right, in this case, as a suitable reward for gallant military service in defense of the Union.

The convention assembled in Liberty Hall, New Orleans, on the sixth of April.[2] It considered itself "invested

[1] President Lincoln to Governor Hahn, March 13, 1864. Works, II, 496.

[2] See Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana, assembled at Liberty Hall, New Orleans, April 6, to July 25, 1864. New Orleans: W. R. Fish, Printer to the Convention, 1864, 643 pages. It consisted of ninety-eight delegates. Judge E. A. H. Durell was chosen president.

with plenary powers, which in our institutions, belong to organic, political bodies," and elected for the purpose of restoring the State to the Union, and of removing the chief cause of the rebellion, slavery.[1] In Missouri and Arkansas, nothing had been said of establishing schools for the freedmen. In Louisiana, the subject received careful attention, almost from the opening of the session. General Banks had been educated under the free school system of his native State, and doubtless had that system in mind when he urged the convention to establish common schools in every district, supported by public taxation, and under the direction of a superintendent of public education.[2] The proposition to establish the Massachusetts school system in Louisiana, for the benefit of negroes, rather startled the convention, and many members pronounced the scheme both unconstitutional and derogatory to the honor of the State. In times of revolution men live fast, but it may safely be said that no man at this time in Louisiana had lived fast enough to be quite ready to tax the State in organizing school districts for the benefit of negroes.[3]

Many members, and probably the majority of the planters in the State, whatever they thought of slavery in the abstract, believed that as the institution had existed in the State since its earliest settlement and had been sanctioned by the constitution and laws, both of the State and of the Nation, slave-owners ought to be compensated for loss of slave property. This sentiment was strongest among the loyal slaveholders, but a majority of the mem-

1 Debates, p. 8.

2 For his educational order, see Debates, pp. 33, 34.

3 For the attitude of Louisiana toward the negro, both free and slave before the war, and the ideas of its people respecting social and civil organization, see my Constitutional History of the American People, 1776-1850, Vol. I, Chapters xii, xiii, xiv, xv.

bers were determined on "immediate, unconditional and permanent abolition."[1] This was the thought of the ordinance which the Committee on Emancipation brought in, on the twenty-seventh. Not only was the institution forever abolished, but the legislature was forbidden to recognize the right of property in man. The black code and laws on the subject of slavery were annulled. Persons of African descent should be equal to white persons before the law, and laws regulating indentures and apprenticeships should not discriminate between the races.[2] There was a minority report, signed by only one member. Emancipation should not be immediate, nor without compensation; for the highest authorities, legislative and judicial, State and national, had recognized a vested right in slave property. The tendency of the race to idleness, the general ignorance of negroes and their lack of skill to provide for themselves would leave them a prey to vice, disease and death. They would be at the mercy of designing speculators. What could Louisiana do with over three hundred thousand free negroes within its borders? Would they not make the State an asylum for millions of blacks, and, at last, would it not be necessary to establish some system of peonage, lest all inducements for white labor be overridden, and the safety of the State be imperiled? But this dissenting voice was not listened to,[3] though it echoed the fears of thousands of white men in Louisiana and all through the South.

There was so much to reorganize in the State, it seemed as if the delegates knew scarcely where to begin. The very foundations of society were broken up, and the duty of the hour seemed to be no less than the creation of civil

1 Debates, pp. 34 and 35.
2 Debates, p. 9.
3 Debates, pp. 97, 98.

order out of political chaos. But men knew that the institution of slavery was doomed. It remained for the convention to record the fact in a constitutional way, and make some provision toward helping the negroes perform the duties of freedmen. This, of course, meant the establishing of some system of education. The prejudices of centuries must be overcome in a day. The negro children must be taught, at least the elements of learning, in order to save the State from the dangers latent in an ignorant, idle and vicious population. Those who are inclined to criticise the South for its treatment of the black race, at the close of the war, quite fail to realize the magnitude of the problem which its white men were then suddenly called upon to solve. Whatever may now be thought of the opinions and actions of those men then, it must be remembered, that revolutions, whether welcome or not, do not suddenly and wholly change the inherited beliefs of men. The reorganization of civil affairs in the South in 1865 was the work of a few men. That the people of impoverished States, whatever the cause of the impoverishment, should, even under military pressure, determine to provide for the education of millions, recently their slaves, and to treat them as equals before the law, was evidence of an altruistic purpose never known in ancient times, and but seldom in modern.

The President's suggestion of emancipation and education was strictly adhered to, but not without serious and well-organized opposition. Could Louisiana be expected to deprive herself, at one stroke, of one hundred and fifty millions of property, and tax what remained to educate that which was taken away?[1] It seemed like compelling a man to improve and pay taxes on property of which he had just been robbed. Grinding necessity is often

[1] Debates, pp. 142, 143.

right, and Louisiana could not now escape the obligation imposed upon her. But there was a third suggestion from the President; the extension of suffrage to negroes conspicuous for gallant services in the ranks of the Union armies. The report of the Committee on the Legislative Department showed clearly how the State would interpret this suggestion. It advised turning the problem over to the legislature and empowering it to extend the suffrage to such other persons, citizens of the United States, as by military service, by taxation to support the government, or by intellectual fitness, might be deemed entitled to the right.[1] But the report gave the elective franchise only to white males; it was therefore open to question whether the suffrage could be extended to negroes, for they were neither white males, nor citizens of the United States.

These critical years in our history will be remembered by posterity as the years when legal and constitutional precedents were freely ignored. What authority, it was asked, had the State to legislate for the education of negroes, or to admit negroes to the elective franchise? No precedent could be found in the Constitution or the laws of the United States, yet the national government was urging the innovation: Let Congress step forth, and help bear the burden, instead of acting the robber. Where was the money to come from wherewith to educate the hundreds of thousands of negro children in the State? Emancipation meant only the further degradation of the race; as might be seen by a day's travel in Mexico. The hue and cry of negro equality, it was answered, and future danger from the black race, manifested a spirit of cowardice. What white man was afraid that the despised

[1] Report of the Committee on the Legislative Department, p. 146.

African would become his equal? Give the negro an education, and he would keep his proper place, and find his level. It would make him a useful and responsible being, which was neither more nor less than his due.[1] This expression of confidence in education echoed that heard twenty years before in the Northern States, when the question of establishing systems of public schools was first seriously agitated, and public opinion found expression in the saying often imputed to Horace Mann, that education is the cheap defence of nations.[2]

But the problem in Louisiana in 1864, was very different from that in the Northern States in 1840, when any system of public education which might be established would receive support, not only from local taxation, and State appropriation, but from the land grants of Congress. Louisiana, and its sister States of the South, in 1864, must meet the burden alone.

It is not strange that many Southern men, at this time, insisted that Congress should aid them in the undertaking; but resolutions to this effect were the work of the minority. The majority insisted, and doubtless convinced the minority, that the State could expect nothing from Congress. Slavery was dead, Louisiana must make constitutional record of the fact, and adjust herself accordingly. She must make some provision for taking care of the freedmen, and do this unaided, except by the military power of the United States. It does not appear that the resolution of Congress of 1862,[3] offering to co-operate with any State in abolition, was for a moment entertained

[1] Debates, 158.

[2] For the account of the establishment of public schools throughout the country, see my Constitutional History of the American People, 1776-1850, Vol. I, pp. 373, 379, 384; Vol. II, pp. 439, 449.

[3] April 10, Statutes at Large, XII, 617.

by any Gulf State at the time, for "the expectation of realizing Southern independence was then high." The President and Congress were in earnest, but to Louisiana, their earnestness was that of an enemy. Now that the hour of abolition had come, Louisiana pleaded for compensation.[1] Congress in 1864, was not in a mood to repeat the offer of two years before, to compensate slave owners, loyal or disloyal, for their slaves.

An explanation was now given in Louisiana: "If there is no slavery in this State to-day," said a member, "I want to know who is responsible for it? If there has been any robbery of slaves in Louisiana, I wish him to explain, who are the robbers? They are the people of Louisiana, themselves, who of their own accord, by passing the act of secession, and by inaugurating the rebellion, renounced and destroyed their slave property forever. If there is any robber, it is the secessionist, and not the Union army, who came down here to preserve the honor and integrity of the country. This people inaugurated the civil war against the United States, and in its progress, as wise men saw from its beginning, it became a military necessity to emancipate their slaves."[2] As well say, that the government had no right to demand his time of the soldier, and that to make thousands of men leave their business, and join the ranks in defence of the United States, was robbery. "To strike down slavery was then to strike down the strong arm of the rebellion."[3] The Emancipation Proclamation had not abolished slavery in the State, for it applied only to designated parishes; the State must abolish slavery. The proclamation had freed

[1] See the elaborate scheme of classification of slaves at $300, $200 and $100 a head. Debates, pp. 175, 186.

[2] Debates, p. 177.

[3] Debates, p. 178.

some slaves. This view entertained by the convention coincided with that of the President, and was based on the accepted principle of American democracy, that a State and not the United States could abolish slavery.

The days of the institution were now drawing swiftly to a close, and it is interesting to read the confessions and opinions of some of its former supporters. It had divided the white population, too long, into the rich and the poor; it had created permanent classes of society, and fixed the condition of whites as well as blacks; its abolition would infranchise both races. But the convention delayed its vote. It was an excitable body, and as the day, when decision must be made, drew near, excitement increased. Nearly thirty delegates wished to escape going on record, and absented themselves. It was decided that every vote on the subject of emancipation should be taken by yeas and nays, and that every member should be brought in by the sergeant-at-arms, and required to record his vote.[1] At least one-fifth of the members were insisting upon compensated emancipation, and the removal of the freedmen from the State. The economic argument heard in Missouri was also heard here. Adopt immediate emancipation, restore peace to the State, interest the freedmen to remain, pay them for their labor, and the increase in land values, and in the productions of the State would more than compensate for the loss of slave property. If experience should prove that the two races could not live together, the State might colonize the negro elsewhere.

As the excitement increased, angry words were spoken, and words spoken in debate led to personal encounters on the streets. The ordinance to abolish slavery was made the special order for the ninth of May. As the results of the vote, on the sections of the measure, were an-

1 Carried, 61 to 2; Debates, p. 196.

nounced, there were repeated cries of "no quorum." The majority were accused "of cramming the ordinance down the throats of the people, and of sowing seeds of bitterness that would never be rooted up." The president ordered the doors closed, and forbade members to pass out. The sergeant-at-arms was busy bringing in absentees. Order was preserved with difficulty. The convention adjourned in confusion. On the tenth it assembled without a quorum, and the sergeant-at-arms was given his instructions afresh. Another effort was made to request Congress, in justice and equity, to compensate loyal citizens, and before any slaves were freed. Amidst confusion, the chairman put the question, and declared it carried. Excited members moved all sorts of amendments. Emancipation should be decreed, but the legislature should not pass any act authorizing free negroes to vote or to immigrate into the State under any pretext. Scarcely a suggestion was made that did not provoke altercation.

The thought of negroes voting put many delegates into a rage; but the resolution mustered twenty-six votes. There was a difference, said a member, between a political franchise and equality; the negro should possess his wife, his children and his house, but that he should have the same elective franchise as a white man was impossible. Had the North granted this right to the Indians?[1] To ameliorate the condition of the black race would be enough. "The first subject is emancipation, and without it we are their masters in every respect, and must control them." Give the negro the right to travel, to acquire

[1] Wisconsin suffered Indians to vote who had severed their tribal relations. See Constitution of 1848, Article III, Sections 1, 3, 34. For an account of efforts to extend to free negroes the right to vote, see my Constitutional History of the American People, 1776-1850, Index, Franchise and "Negroes," and especially the discussion in Michigan, in 1850.

property, and to be a qualified citizen, as in the case of women and minors,—but never to vote.[1] Immigration, said a member, could not be prevented; the exclusion would keep out negro soldiers, and would be ignored by the national government.[2] Why this anxiety to send all the negroes out of the State? It needed negro troops now to protect it. "The colored population of this State," said a member, "is as willing to fight for the country, and maintain our rights, as any member of the convention." Give the negro the elements of an English education, provided the whole expense was not saddled on the people of the State, for his education concerned the United States as much as Louisiana; but to give him the right of suffrage would only result in making the State a colony of negroes.[3]

On the eleventh, the convention opened again without a quorum, but the activity of the sergeant-at-arms and the arrival of some belated members, soon made the required number. The abolition clause had been reached. The minority repeatedly protested against the "choking process" of the previous question. Members in the minority began to take their leave, amidst protests. The secretary read,—"Slavery and involuntary servitude, except in punishment for crime, whereof the parties shall have been duly convicted, are hereby duly abolished and prohibited throughout the State." Amendments were offered, but the president declared them out of order. A member of the committee that had reported the ordinance, moved the previous question, and it was carried by a rising vote.[4] The main question was then put, and the secretary proceeded to call the roll. An altercation over the

1 Debates, p. 212.
2 Debates, p. 213.
3 Debates, p. 218.
4 61 to 24.

rules ensued. The president ordered members to their seats. "I protest in the name of the people of Louisiana," shouted a member. "Disgraceful," "Tyrannical," "Order," were shouted. The roll call went on. "I vote no, in the name of the people," explained a delegate; "In the name of Jefferson Davis," retorted another; "In the name of the people, yes," cried another; "For the good of the Union," shouted a third; "Without compensation, no," cried a fourth; "I have nothing against compensation, but as no value is attached to the negro in Louisiana, I vote, yes," shouted another amidst applause. "True to myself and my constituency, I vote, yes," said a delegate, and another exclaimed, that he "had been voting against slavery for long years." "For the good of the white race and the black, yes." One member changed his vote, and, all rules being suspended to allow the president to vote, amidst prolonged applause, he voted, "Yes, with my whole soul." The result was then announced. Seventy-two members had voted for the ordinance, and thirteen against it. The president declared it a part of the law of the State of Louisiana.[1]

On the twenty-fifth of July the convention adjourned. The constitution, which had been submitted to the people, was more liberal than any ever before adopted by a slave-holding State. It abolished slavery by its first article.[2] While it described the elector as a white male, it empowered the legislature to extend the suffrage, as the President had suggested.[3] It made a generous provision for public education, by making it obligatory upon the legislature to maintain and encourage free public schools for the education of the children of the State, between

[1] Debates, pp. 221, 224.
[2] Title I, Article I, II.
[3] Title III, Article XV.

the ages of six and eighteen.[1] Instruction should be in the English language, and a university should be established. All able bodied men in the State, irrespective of race, should be armed, and disciplined for its defence,[2]—a provision more liberal than the militia clause in the constitution of any Northern State, at the time, excepting New Hampshire, Vermont and Massachusetts. Louisiana, a half century before, had been the first slaveholding State to enroll negro regiments, and it was now the first to provide for the enrollment of free negroes in its militia.[3] No such marvelous change had before been made in the civil organization of an American commonwealth. On the fifth of September[4] the constitution was ratified, and on the nineteenth it was formally declared to be in force by Governor Hahn. Members of Congress and State legislature were chosen. In October, the legislature elected United States Senators, but Congress refused to admit them.[5]

While emancipation had been strengthening in Missouri, Arkansas and Louisiana, and converting them into free States, Maryland had been restless under the spirit of reform. The State contained a half million whites, and about one hundred and seventy thousand blacks, nearly

[1] Title XVI, Articles CXL and CXLVI.

[2] Title VI, Article LXVII.

[3] By the act of January 30, 1815, which authorized free negroes residing in the parish of Natchitoches, who possessed real estate at the value of One Hundred and Fifty Dollars, to serve with the second war with England, though at the time of the Act peace was declared, but the news had not reached Louisiana.

[4] Fixed by ordinance; Title XIV Article CLII. For the constitution 6,836, against it 1,566.

[5] The United States Senators were chosen October 10. Congress refused to admit the delegates, and the State was unrepresented in the Senate from February 4, 1861, to January 25, 1868.

equally divided between slave and free.[1] In no other Commonwealth were the numbers of slaves and free persons of color so nearly equal. When, in 1850, the State, in convention, adopted a new constitution, public sentiment was reflected in the instructions, which the convention gave to the Select Committee on the Free Negro Population, to submit some plan looking to the riddance to the State of free negroes and mulattoes.[2] The multitude of free persons of color within the State, and its nearness to free soil, ever tended to make its slave property less docile and secure, but these disintegrating causes tended, also, to make the supporters of slavery more intense in their devotion, and to make the thought of abolition even more hateful to the people of Maryland, than to those of any other slaveholding State. Its more thoughtful people were convinced that the institution was not permanent.

Maryland, like Missouri, was a mere Northern peninsula of slavery, and its people were not wholly averse to getting rid of the negro,—if they could be compensated. But when the opportunity for compensation came, Maryland, with the other border States, as we have seen, refused to co-operate with the President and Congress. The pride, one may say the vanity, of State sovereignty was in the way. There was an element of coercion even in Congressional compensation; it was a kind of respectable confiscation by the national government, thinly veiling a

[1] By a census of 1865 there were 515,918 whites, 87,189 slaves and 83,942 free colored persons. Preliminary Report on the Eighth Census, p. 131.

[2] See Proceedings of the Maryland Constitutional Convention, Annapolis; Riley and Davis, Printers, 185; 895 pages. For the committee's report favoring the removal of this class from the State, making it incapable to acquire or hold real estate, but permitting leases of realty, see pp. 496-505.

military act. The State would emancipate its own, when it chose.

The South seemed never able to understand, if it ever believed, that President Lincoln would save the Union, and at the same time protect slavery. The ideas were too incongruous. When, at the interview with the border-State representatives, the President assured Maryland, that she "had nothing to fear, either for her institutions or her interests on the points referred to," a Maryland Congressman immediately added, that if the people of the State could hear this, they would consider the proposition with much better feeling.[1] But a constituency is not a Congressman; the people of Maryland, in March, 1862, were not yet persuaded that they were in the midst of a rebellion, which was radically to change their civil and social institutions.

Public opinion in the State was expressed in the resolutions of its legislature, characterizing the effort of its Congressmen to devise schemes of abolition of slavery in rebellious States, as a waste of time.[2] Even more antagonistic were the people themselves, who in many meetings, passed resolutions against emancipation; for as yet, they would not tolerate the thought of abolition. As in Louisiana, slaves were owned chiefly in the rural dis-

[1] Memorandum of an interview between the President, March 10, 1862, and some slave State representatives. Lincoln's Works, II, 134.

[2] At the same time a bill was before the legislature for calling a constitutional convention, and it included a clause that the convention, when assembled, should pass no law interfering with the existing relation of master and slave,—using the language of the constitution in the clause cited above. It passed in the Senate by sixteen to two, but in the House the delegates expunged it from the Bill on the ground that the legislature had no power to bind the convention. See Debates, p. 581.

tricts; Baltimore was almost a free city,[1] and it was there that a radical, though long a minority, party in the State arose, favoring a constitutional convention and the abolition of slavery. This party was encouraged by the Emancipation Proclamation; though Maryland, like Missouri, was not included within its operation. Public opinion was changing in the State, and one of its representatives in Congress introduced a resolution in January, 1863, raising the question of Congressional aid in emancipation. But a bill to this end got no further than a select committee, and, for the reason, as it is believed, that the Maryland members, like their constituents, opposed it.[2] The Maryland radicals lacked organization and the power that goes with the control of a strong party machine. The Union men of the State were much divided, and, as had been the case in Missouri and Louisiana, emancipation was delayed by local and factional

[1] The relatively small number of slaves in the City of New Orleans was the subject of much discussion in the Louisiana constitutional convention of 1845. See Proceedings and Debates of the Convention of Louisiana, which assembled at the City of New Orleans January 18, 1844, to May 16, 1845; New Orleans, 1845, 960 pages. The discussion runs through the volume, and shows that slavery could not prosper other than in agricultural regions, therefore, in manufacturing and commercial centers, labor must be performed by free persons, more or less skilled. For this reason New Orleans was practically a free city; Baltimore was ultimately in the same class. From the evidence presented in Louisiana and Maryland (see Debates of this convention of 1850 before cited) one is led to the conclusion that the multiplication of cities in the South would ultimately contribute, if not compel, the abolition of slavery, for slavery, at least in modern times, cannot long exist in a manufacturing community. For an account of slavery in Louisiana see my Constitutional History of the American People, 1776-1850, Vol. I, Chapters xiii, xiv, xv; that the institution could exist only in an agricultural community, see Vol. II, Chapters i, vi.

[2] See the Congressional Globe from January 12 to February 26, 1863. The resolution was introduced by Francis Thomas, of Maryland; the bill by John A. Bingham, of Ohio.

quarrels, more than by the real sentiments of the people. But, in the three States, a liberal, public sentiment was growing and constantly strengthening, and it was encouraged by the progress of the war, and particularly by the attitude of the President toward slavery, as indicated in his message to Congress in December, 1863.

In this he declared "that the general government had no lawful power to effect emancipation in any State; that whatever he did in emancipation, must be a military act." "Maryland," he said at this time, "was only disputing as to the best mode of removing it." The dispute, though factional, was earnest. It was no secret that he wished success to the movement. "It would aid much," said he, "to end the rebellion." It was a matter of national consequence, and its friends should "allow no minor consideration to divide and distract them."[1] That factional feeling was subsiding, was manifested from an act of the legislature, passed in the January session, 1864, appointing an election for the sixth of April, when the question of a convention should be decided, and delegates chosen.[2] The majority in favor of a convention was large, and, of the ninety-six delegates elected, sixty-one were in favor of emancipation.[3]

While the convention was in session, the National

[1] Lincoln to Creswell, March 16, 1864. Lincoln's Works, Vol. II, p. 298.

[2] Acts of the General Assembly of January Session, 1864, p. 5; also see the Convention Bill, pp. 22 and 24 of the Debates of the constitutional convention of the State of Maryland, assembled at the City of Annapolis, April 27, 1864; Annapolis: Printed by Richard P. Bailey, MDCCCLXIV, Vol. I, 744 pages; Vol. II, 745, 1,384 pages; Vol. III, 1385, 1,988 pages.

[3] The convention was in session from the 27th of April to the 6th of September, and briefly on the first of November, when it adjourned sine die. Its session was not only one of the most interesting on record, but its debates are among the most voluminous, covering nearly two thousand octavo pages.

Union Convention to nominate candidates for the offices of President and Vice-President of the United States, met in Baltimore, June seventh and eighth, renominated President Lincoln, and associated Andrew Johnson of Tennessee with him as Vice-President. The first clause of the platform on which they were nominated declared it the highest duty of every American citizen to maintain the paramount authority of the Constitution and the laws of the United States.[1] This doctrine of a powerful party, if true, would eventually reconstruct the Union. It was the antithetic of State sovereignty. Before the year closed it was to be incorporated in the constitution of two States: Maryland, a member of the original thirteen, and a slaveholding State, and a new State,—Nevada. Maryland was the first to discuss the new doctrine, and the debate ran through nearly half the summer.[2] The whole constitutional history of the Union was reviewed. The intentions of the Fathers were re-examined, and the Federalist, and the debates in the Convention of 1787, were cited in proof, and in disproof, of the doctrine of national supremacy.[3] On the thirty-fourth day, just a week after the Republican party had proclaimed the principle,[4] Maryland, by a vote of fifty-three to thirty-two, incorporated this idea in its Declaration of Rights. Our history gives no like instance of the transformation and adoption, in so brief a time, of a party doctrine into a State constitution.[5]

[1] Proceedings of the First Three Republican National Conventions, 1856, 1860, 1864; Charles M. Johnson, Minn., p. 225.

[2] It is found chiefly in the first volume of the Debates.

[3] See the discussion in the Federal Convention, Vol. I, pp. 315, 352, 371, 383, 389, 392, 413, 445, 451, 483, 518, 525, 555.

[4] Adopted, 53 to 32, June 16, 1864. Debates, Vol. I, p. 534.

[5] "We all know," said Edward W. Belt, of Prince George County, "that the people who held the consolidation theory, and the people who held the States-rights theory were there; and now it

But the Maryland convention was not called primarily to formulate the doctrine of the paramount authority of the national government; the great and immediate subject before it was emancipation. In entering upon its solution, the members could not forget, even if the majority could ignore, the prejudices of a lifetime. This was illustrated in their manner of approaching the subject, which might fitly be compared to that of a skirmish before a battle. Many resolutions re-echoing the slave laws of the State, were introduced and discussed as preliminary to the work which the hour demanded. All these had a familiar sound. One would exclude free negroes from the State, declaring them incompetent to make contracts. Another, for the offence of employing a free negro or of encouraging him to remain, would impose a fine of not less than fifty or more than five hundred dollars.[1] This treatment of free negroes only followed the precedents set by Ohio, Indiana and Illinois. Had it not always been the policy of non-slaveholding States to get rid of the free negro, lest, if allowed to remain in the State, he come in competition with the white laborer?[2] But, it was

is proposed, for the first time in history, to incorporate into the organic law of a sovereign political community what is, in fact, nothing in the world but one of the dogmas of a party platform. You here wish to put into the convention (constitution?) of Maryland the declaration, that we who have held the States-rights theory are wrong, while you who have held the contrary are right, because you thus make it the fundamental law." Debates, June 3, 1864; p. 321. "The Constitution of the United States, and the laws made in pursuance thereto being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in controversion or subversion thereto." Maryland Constitution, 1864, Declaration of Rights, Article V.

1 Clark's Resolution, Debates, p. 110.

2 For an account of the treatment of free persons of color by Northern States, see my Constitutional History of the American People, 1776-1850, Vol. I, Chapter XII, and Index, "Free Negroes."

asked, had not the events of the last few months totally exploded the doctrine of negro labor coming into competition with white? for this old cry was silenced by the fact that wages were twice as high in Maryland since it had virtually become a free State. To enfranchise the negro must not be construed as meaning equality; propositions to that effect should never be made a part of the constitution. Give the negro equal human rights, of husband and wife, of parent and child. Give him the right to labor, and to receive an equivalent for his labor. Give him the right to educate his children if he could: this would be the true policy for Maryland. When he was sufficiently civilized, and, desiring to take part in the government of the land,—though he knew he never could do so,—then the emigration of the race from the State would begin in a perfect flood tide. Knowing that they never could be received as the equal of the white race, negroes would seek a new country for themselves.[1] This meant simply that the State would grant privileges to the negro for the sake of getting rid of him.

The fears always expressed whenever a State freed a slave, or for a moment thought of giving rights to the negro, were now greater than ever.[2] Already a multitude of runaway slaves had come up from the South, and from

[1] Debates, p. 111.

[2] See the Debates in the New York Constitutional Convention of 1821: in the Missouri controversy, 1820, 1821, an account of which may be found in The Constitutional History of the American People, Vol. I, Chapter IX; in the Constitutional Convention of Pennsylvania, 1838; Louisiana, 1845; in New York and in Iowa in 1846; Wisconsin, 1848; in California, 1849; in Michigan and Maryland, 1850; for a bibliography of the Journals and Debates of these conventions, see my Constitutional History of the American People, 1776-1850, Vol. II, pp. 395, 398; see also an account of public sentiment on the subject of free negroes, Id., pp. 7-9; Michigan, pp. 10-12; California, pp. 408, 447, 499.

other parts of the country, and had congregated about Washington. Prince George County was in danger of being overrun. Its white families were in danger. In consequence of the loss of slave labor, a large class of white men in the State were now able to rent land. Let the free negro remain, and the land owners would continue to work their land by his labor; but the poor white man, unable to buy or rent, would have to work at a negro's wage. Maryland would become a second Hayti or Jamaica. The white land owners, and the landless whites, would alike be injured.[1]

But all did not take this view. Adopt a system of emancipation, and the former slave would be in the same condition as the free negro. He would depend upon his own exertions. Old and infirm slaves would remain with kind masters, would perform light services, and be properly cared for in return. Those who left the plantation would come under the laws regulating free negroes, and, therefore, be prevented from lapsing into vagrancy and crime. The language of the emancipation proposed was from the Ordinance of 1787, long familiar to the people of the States, but, if included in the Bill of Rights, it did not prevent some future legislature from reducing the free negroes to slavery. Under the constitution of 1850, the power of disposing of the race rested with the legislature; but that constitution was now to be amended.[2] Yet, Maryland should not be blind to the consequences of emancipation; the experience of General Banks in Louisiana might be repeated in Maryland. The State would have over one hundred and eighty thousand free negroes. The restraints of the old laws would be wholly removed; the free men, after a few months' celebration of their

1 Debates, p. 112.
2 Debates, 238.

liberty, might not work, save fitfully, but "become an unbearable nuisance and a burden upon the community." In Louisiana, it had been found necessary for the military authorities to order this class to work, to fix their wages, and to punish them for idleness and vagrancy; therefore, the emancipation clause should be accompanied with a provision that would secure a rigid system of discipline and labor.[1]

This idea, however, did not meet with favor.[2] As difficulties in the way were disclosed, the burden of emancipation seemed too great for the State to bear alone, and it was proposed to secure, if possible, a renewal of the President's offer of compensated emancipation.[3] But it was too late; Congress, in 1864, could not restore the offer of 1862; the sentiment of the Nation would not permit it; even the convention itself rejected the idea by a vote of nearly two to one.[4]

The question of abolishing slavery was part of a somewhat new concept of the national government, and of its relation to the States. It was not easy for some of the members to give up the belief that slavery was "the chief corner stone of American government." They turned instinctively to the South, where a Confederacy, whose fundamental idea was slavery, had been formed, not merely to break away from the old Union, but to extend the slave power southward, where "Tamaulipas and Chihuahua, and other Mexican States, all around the Gulf of Mexico, like pears fully ripe, were waiting to drop into the laps of those ready to gather them."[5] The Gulf of Mexico

1 Debates, 239.
2 Rejected, thirty-seven to twenty, Id.
3 Debates, 248, 302, 579, 606.
4 52 to 30; Debates, 302.
5 Debates, 312.

should be an inland sea, surrounded by slaveholding States. The picture was an attractive one to a mind educated to believe in slavery, and ignorant, by experience, of any other social condition. Though it was rather late in the day, the members went into a long debate of the merits and demerits of secession, of its constitutionality, its expediency, its experiences, and its future.[1] There were a few secessionists in the convention, but its opinion was fully expressed, when it incorporated in its new constitution the doctrine of paramount allegiance to the national government. So comprehensive of the civil issues of the day, and indeed for all future time, was this question, that the discussion of emancipation was dropped, until the question of sovereignty was settled.

Though our chief interest is in the evolution of political thought in America, expressed from time to time in the action of political bodies, our attention is frequently attracted, during the long debate, to individuals and their utterances. When emancipation was under discussion in Missouri, it was a former slaveholder who made the most eloquent and logical plea for abolition. Here in Maryland, a like plea was made, by a member also long a slaveholder who had become convinced that the future welfare of his State depended upon abolition. His plea was a refutation of all the stock arguments for slavery:—the authority of the Scriptures; the natural condition of the African; the evident intention of the Creator that the black race should ever be subordinate to the white; the advantage of slavery to the African; its morality, when properly regulated, and the higher civilization, which the system had developed in the South.[2] He contrasted the

1 Debates, 303, et seq.

2 Debates, 538, 552. The speaker was James Valliant, of Talbot County.

slaveholding States with the free, showing, as it had been shown fifteen years before, in Kentucky, that the wealth, the prosperity, the influence of a country are ever commensurate with its free labor.[1] In spite of the arguments which, for more than two hundred and fifty years, had sustained slavery in this country,—and chief of those were the arguments for the rights of property, and, later, the compromises in the national Constitution; in spite of the decisions of courts, the acts of legislatures, and the constitutions of States, the Nation now demanded, and the needs of the State of Maryland made clear, that slavery and involuntary servitude should forever be abolished.

To-day, we can with difficulty, do justice to men, who, born slaveholders, and taught by church and school the sanctity of the institution, yet courageously turned their backs upon their own past and, facing poverty, social and political ostracism and death, advocated the abolition of slavery. It was easy for Wendell Phillips and William Lloyd Garrison to demand emancipation, for they had a different heritage from that of their Southern brethren. It has long been customary to associate negro emancipation with the aggressive conduct of devoted, and as they were called, fanatical men and women at the North, who never owned a slave; but "with malice toward none and with charity for all" we should remember, that the great sacrifices for slavery were made by the loyal men and women of the South. If the thought was Northern, the suffering was Southern, and ere long, was borne by the almost helpless freedmen through a decade of terrorism,

[1] Debates, 546, 548. For an account of the contrast drawn in the Kent convention of 1849, see my Constitutional History of the American People, 1776-1850, Vol. II, Chapter VI.

cruelty and crime almost without parallel in the annals of men.

The defenders of the institution, though in the minority in this convention, were not silent. Where was the power in the State, it was asked, to divest the owner of his title to slave property? Every constitution and government in the land recognized the universal principle of all good government, that private property cannot be taken, even for public use, without just compensation. But independent of that, there must first be established the necessity for taking the property; either the interest of the State, or some great public emergency, or moral or political good must be at stake. Did any such necessity exist in Maryland? Why strike down this property, which from time immemorial had received the especial care of the legislature, and protect other kinds? The market returns showed that the product of slave-labor were three times as great as they had ever been before. Had the State been blessed with a governor brave enough to maintain the rights of its people, and he had promptly sent the militia into the slave counties, no power in the United States would have interfered with slave property for a moment. It was worth more to the people of Maryland than ever before; to this property the State owed all its wealth. The President had confessed that the Federal Government had no civil authority to emancipate slaves. Why should Maryland act against its own interest? Did not the return from the Treasury Department at Washington show, that, for forty years, the aggregate exports from the South were twice as great as those from the North, and that the duties on the imports were in the same proportion?[1] Yet slave labor was the

[1] Debates, pp. 565, 569. It was claimed by the speaker that the exports from the South from 1821 to 1861 were $3,718,027,891;

producer of most of this wealth. Why, then, dry up the sources of prosperity? The constitutional convention of 1850 had positively enjoined the legislature from interfering with the relations existing between master and slave.[1]

Now the spectacle was presented of a convention engaged in overturning and striking down the banners of protection, which had been thrown around this species of property. Claiming to represent the sovereignty of the State, it was undoing all that the legislation of centuries had built up. Emancipation involved more than the loss of money invested in slaves. In Southern Maryland, as every one knew, the staple product was tobacco, which could not be successfully grown, except by slave labor. There, land owners had invested vast sums of money in buildings, machinery and other material, for the production of the crop. Suddenly their slave-labor was to be taken from them. The cultivation of their most remunerative crop must cease; the land could not be turned to profitable account, and the money invested in property, buildings and machinery must prove a total loss.[2] Nor was it true that Maryland contrasted unfavorably with the free States. Its area differed but slightly from that of New Hampshire or Vermont, yet it had more than twice the population of either.

The superior wealth and population of Massachusetts were not due to her free system of labor, but to other causes. Granting that Maryland had more white illiterates than New Jersey, it proved nothing against the

from the North, $1,838,311,381; the duties paid by the South during this period, $799,508,378; paid by the North, $392,366,065.

[1] The legislature shall not pass any law abolishing the relation of master and slave, as it now exists in this State. Maryland Constitution, 1851, Article III, Section 43.

[2] Debates, 576.

institution of slavery, and only that New Jersey had adopted a better and more liberal system of education than Maryland. It would be well to remember that a larger proportion of the Presidents of the United States, of the Judges of the Supreme Court, of the Attorney-Generals, of the Cabinet Ministers, and of the Foreign Ministers and the Consuls, had come from the slave-holding South. Though numerically smaller than the North, the South had filled Congress, and most of the responsible offices in the government of the United States, with men of learning and efficiency, whose official career sufficiently dispelled the illusion, that the South was the benighted region, which abolition fanatics would have the world believe.[1]

Moreover, Maryland was not responsible for slavery. It was older than the convention; its members might well let so venerable an institution alone. By persisting in unwarranted encroachments upon the rights of slave-holders in Maryland, the Federal Government had well nigh annulled the constitution and laws of the State. Would the convention endorse and legalize these acts of usurpation and aggression? From 1776 till 1862, Maryland, a free, sovereign and independent State, had preserved the institution of slavery intact, and had protected it by its constitution and its laws. Was it now to be concluded that the thirty-two thousand men who had voted for emancipation at the late election expressed the settled policy of the State, when, as everybody knew, more than a majority had not voted on the subject at all?[2]

An answer was made to all these objections. If the Federal Government had destroyed slavery in the State, then the convention could do no wiser thing than to pro-

[1] Debates, 576.
[2] Debates, 582.

vide for the former slaves. The State would be more than compensated for the loss of her slaves, by the increased prosperity that would follow to her citizens. The economic argument lately advocated in Missouri and Louisiana was repeated. White men would immigrate into the State and develop its almost untouched resources. The rise in land values would more than compensate them for the loss of slaves. General education would raise the condition of all classes, and the backwardness of the State in learning and industry would be removed.[1] This argument lost no weight, if for a moment the condition of the State was considered. Slaves were escaping daily in great numbers, as had been the case in Missouri. Soon farm laborers would be scarce. Would it not be better to interest the negro to remain by giving him his freedom?

Every institution, good or bad, has had its apologists, and at the last, its death-song. Though the singing was vicarious, the song now was the same all through the border States. Secession had overreached itself. The secessionists had worked their own destruction, and slavery was dying in the house of its friends. Not content with its security in all the slave States, they must extend it over all the territories; they even had contemplated the reopening of the African slave trade.[2] So long as they controlled the departments of the government they were willing to wield it for their own purposes. The moment the scepter passed into other hands, they took arms to destroy that which they could no longer dominate, and now, here in Maryland, the piteous cry was raised of the depreciation of slave property.[3] Free the slaves; the State was in need of vastly more laborers than it had;

[1] Debates, 592, 593.
[2] See Vol. II, pp. 651-654.
[3] Judge Chambers; Debates, 610.

thousands of acres remained uncultivated for lack of laborers. Establish schools; encourage education; compete with the free States on their own conditions. Slavery was improvident and wasteful. The very appearance of Maryland as contrasted with Pennsylvania proved this.[1] "We have been striving to progress with a dead weight upon us,—the institution of slavery," said a member. "We have fallen behind, and now we have resolved that it is time to change our policy."

At last, on the twenty-fourth of June, on the fortieth day of the convention, the vote was reached, and slavery in Maryland was abolished.[2] Though abolition was carried by a large majority, at least thirty-five delegates were bitterly opposed to it, and laid every obstacle in its way. They knew their constituents, and the prospect of ratification was not encouraging. The friends of the amendment were equally zealous. They invoked the influence of the President, and his wishes for the success of the provision, expressed in one of the most earnest of his letters, were undoubtedly a powerful influence in its behalf.[3] His generous thought was expressed in a single sentence: "I wish all men to be free."

On the twelfth and thirteenth of October the votes were cast, and the constitution was ratified by the meager majority of three hundred and seventy-five.[4] An examination of the returns showed that the soldiers' vote, cast in the various national camps, wherever a Maryland man

[1] Debates, 612.

[2] By a vote of 51 to 27. Debates, p. 742. On 8th of July two delegates, who were absent when the vote was cast, recorded their vote, one for, the other against, the clause. Id., 764.

[3] Lincoln to Hoffman. Works, II, 584.

[4] For the constitution, 30,174; against it, 29,799; see the Official Vote, Debates, 1926.

was serving, saved the constitution.[1] The returns were disputed, and the whole cast was carried to the Court of Appeals. It sustained the vote and on the twenty-ninth of October, Governor Bradford proclaimed that the constitution was adopted, and that it would supersede the constitution of 1851 on the first day of November, 1864.[2]

While this interesting discussion was going on in Maryland, a similar one might have been heard in the territory of Nevada. Two days before the close of Buchanan's administration, the territory had been organized,[3] and by the decision in the Dred Scott case, was slave soil.[4] It then contained about seven thousand people.[5] As first organized it was about two-thirds as large as the present State.[6] In 1863, the people, without an enabling act from Congress, elected[7] a convention, which submitted a constitution for popular ratification. It was rejected, because the people felt unable to bear the burden of a State government, but the discovery of precious metals at once

[1] The vote, outside of the soldiers' vote, stood 27,541 for the constitution, and 29,536 against it. The soldiers' vote was 263 against it, and 2,633 for it.

[2] For an account of the appeal, and the Proclamation of the Governor, see the Appendix to the Debates, 1903, 1926.

[3] March 2, 1861. Statutes at Large, XIII, 209.

[4] See Vol. II, pp. 536-544.

[5] By census of 1860, 6,857; all, except one hundred and forty-five of whom were living in Carson County, which has disappeared from the map, and there are no records to account for its disappearance. See Compendium of the Eleventh Census, Part I; "Population," page 30.

[6] The additions made July 4, 1862, and May 5, 1866, are shown on a map given in Hough's American Constitution. Albany: Weed, Parsons & Co., 1872, Vol. II.

[7] The election on September 2, 1863, showed 6,660 votes for, and 1,502 against calling a convention. It adjourned December 11, but the constitution it proposed was rejected by a large majority.

stimulated immigration, and in 1864, public sentiment led Congress to pass an enabling act on the twenty-first of March. It provided for an election of delegates in June, to meet in convention on the fourth of July, for the purpose of framing a constitution.[1]

The convention which assembled at Carson City presented many interesting features. Not one of its members was born on the Pacific coast; twenty-nine were natives of free States;[2] one came from Kentucky. Nearly one-third of the delegates were born in New York. The lawyers and miners among them were nearly equal in number. There were two editors, five business men, a physician and a banker. All save two had come to Nevada from California, and the longest residence any had in the territory was seven years. The delegate from Kentucky recorded himself as a Democrat, and all his colleagues called themselves Union men. In the election of 1860, fourteen had voted for Lincoln; thirteen for Douglas, and seven for Bell. Most of them had been delegates to the convention of 1863.

[1] For the enabling Act see Statutes at Large, XIII, 30. It is also given in Debates and Proceedings of the Convention, San Francisco, 1866, pp. v-ix. For Bill introduced by Senator Doolittle for the admission of Nevada, see Congressional Globe, First Session, 38th Congress, 1863-1864, Part I, p. 529; report by Senator Wade, 693; Debates, p. 787; Report in Senate as passed by the House, Part II, p. 1162, passed March 21, 1864, p. 1209; Signed by the President, p. 1228; Supplemental Bill, May 21, 1864, Part III, p. 2405, and Statutes at Large, Vol. XIII, p. 85. Population of Nevada in 1864 was 42,491. Its population in 1864 is unknown, but on the basis of the vote on the constitution, remembering the ratio of adult males, was greater than the older States, it may be estimated at 34,000.

[2] New York 11, Pennsylvania 4, Vermont and Maine three each, Massachusetts, Connecticut, Ohio and Indiana two each, New Hampshire, Illinois, Kentucky, England, Ireland and Canada one each; four delegates did not attend.

The constitution of 1863 was the basis of this of 1864.[1] Two important provisions distinguished the earlier constitution from any before proposed to the people of a State or territory. These two, and a third, equally important, were incorporated in the new instrument. Slavery was prohibited.[2] The precedent was already set by California and Oregon.[3] But the Nevada delegates, though nearly all hailing from California, brought with them more than a disposition to forbid slavery. They favored the new doctrine that "paramount allegiance of every citizen is due to the Federal Government," a doctrine discussed at great length, and at last adopted, as we have seen, in the Maryland convention. The Nevada delegates went further; they declared, in their bill of rights, that "the Constitution of the United States confers full power on the Federal Government to maintain and perpetuate its existence, and that whensoever any portion of the States, or people thereof, attempt to secede from the federal Union, or forcibly resist the execution of its laws, the federal government may, by warrant of the Constitution, employ armed force in compelling obedience to its authority."[4]

[1] The text of the constitution, of 1863, is given in the Debates and Proceedings, pp. 24-33.

[2] Constitution of 1863, Article I, Section 18; of 1864, Article I. (Declaration of Rights) Section 17.

[3] Constitution of California, 1848, Article I, Section 18; of Oregon, 1857, the question of slavery being especially submitted; Article XVIII, Section 2. The vote for the constitution was 4,093; against slavery, 5,079; against free negroes, 7,559. See Portland Oregonian, December 19, 1857.

[4] The Constitution of 1863, Article I, Section 2. The thought was more guarded; see the language of the Constitution of 1864, which declares that paramount allegiance is due the federal government "in the exercise of all of its constitutional powers, as the same have been or may be defined by the Supreme Court of the United States;" but the right of coercion was maintained. Constitution of 1864, Article I, Section 2.

The proposed constitution of 1863 was made at the time of the President's proclamation of amnesty and reconstruction, which, it not only reflected, but incorporated.[1] No person convicted of treason or felony, unless restored to civil rights, nor one who, after arriving at the age of eighteen years, had voluntarily borne arms against the United States, or held civil or military office in any of the so-called Confederate States, unless an amnesty had been granted by the Federal Government, nor any disloyal person could exercise the privilege of an elector. This was repeated from the constitution proposed in 1863.[2]

It will be noticed that the Nevada convention adopted the doctrine of paramount allegiance to the national government fully six months before it was promulgated, as a party principle, by the Baltimore Convention, and that Nevada introduced it into her constitution a year before it was adopted by Maryland. The debates in the first Nevada convention are not preserved, but the sentiments of the delegates in 1864 were the same as the later record shows.[3] Like the people of the territory itself the delegates had light and loose political associations; had no

1 The President's Proclamation of amnesty and reconstruction, December 8, 1863, was not known to the Nevada convention, which adjourned three days later, as the news did not reach the Pacific coast. The amnesty to political or State prisoners, which the President through the Secretary of State offered on the 14th of February, 1862 (Lincoln's Works, II, 125), was the precedent for the amnesty clause in the Constitution.

2 Article II, Section 2.

3 The Debates and Proceedings of 1864 are among the most instructive of the records left by constitutional conventions. They were edited and published in a better style than any of their predecessors in other States. They fail, however, to show the individual vote on the various resolutions. The delegates so frequently referred to the opinions of the first convention that its sentiments are quite well known.

common traditions, and had only the beginnings of State pride. Like the pioneers of California in 1849, they were a composite people, and therefore easily amalgamated. The doctrine of paramount allegiance was easy for them to adopt. Nevada was the creation of Congress. The people of Maryland could look back over more than two centuries of colonial and State history. They could therefore the more easily believe that the Federal Government was the creation of Maryland, and its twelve sister States. Nevada, seeking admission, like West Virginia, in the midst of a civil war, naturally intensified the allegiance due from every citizen of the territories to the general government. It might perhaps be expected that debate, on so critical a question, would be long and exciting. On the contrary, it was calm and brief. The Nevada delegates, looking eastward, saw the Union struggling for life. They came from eleven of the older States, and, as from their new home in the far West, amidst "the great American Desert," they watched the progress of contending armies, they forgot their native States, as they thought of the Union; they forgot the great battle of 1860, and, ignoring old party associations for Lincoln, for Douglas, or for Bell, they acted as Union men. The result was, the almost unanimous adoption into the constitution of the doctrine of paramount allegiance.[1]

Did not all believe that the Constitution of the United States was the supreme law of the land? Granting the Constitution to be a compact, it was "a bargain that nobody has a right to secede from."[2] Even if a State undertook to withdraw its allegiance, the allegiance of its citizens was still due to the United States. Granting the premise of paramount allegiance, there followed the na-

[1] July 6, the third day of the convention; Debates, p. 53.
[2] Debates, 44.

tional right of coercion, and it was now proclaimed,—the only instance in the history of an American Commonwealth. With the same unanimity, slavery was forbidden;[1] but the decision on the right of suffrage was far different. Should the principle of the President's amnesty proclamation be followed?[2] The question involved many difficulties. Who was to be the final judge of loyalty? The territory had already become the refuge of hundreds of Confederate soldiers, many of whom were outspoken secessionists. Ought they to be permitted to vote? Would they not endanger the State? Would Congress favor its admission if they were allowed the right of suffrage?

Another new doctrine was also promulgated, that the national government has a right to define the elective franchise.[3] But the question was scarcely raised before a member inquired, whether negroes and women were to be excluded. The national Constitution, it was said, declared equal rights and privileges to citizens of the different States, therefore, Nevada could not exclude a white man from the suffrage, though it might exclude a black man, because by the decision of the Supreme Court, he was not a citizen. True, said another, but, at the present time, it was considered that black men were citizens; they were so recognized everywhere.[4] This assumption of the judicial function by the delegates was due, it must be said, not merely to the fact that negroes voted at this time in New Hampshire, Vermont, Massachusetts and New York, but to another fact, that they were fighting in the ranks for the Union. Yet the suggestion of negro suffrage caused a shudder; no delegate presumed to advocate it, though the idea was not so novel as that of paramount allegiance to the general government, or its right

1 Id., 67.
2 i. e., December 8, 1863.
3 Debates, 89.
4 Debates, 90.

to coerce a State. It was easier to disfranchise rebels than to enfranchise negroes, and the convention moved in the line of least resistance, with Lincoln's amnesty proposition as its guide.[1]

Loyalty was the word, but the principle debate was on the word "disloyal," which was used in the constitution of 1863. Many now wished it striken out. "A man," said a member, "may have been disloyal last year, and to-day be exceedingly loyal." It was not twenty years since men in any of the Northern States had dared freely to declare their belief that slavery was wrong, "that it was contrary to the principle of republican government, and to the teaching of the Gospel." But men, who in the early forties were most earnest advocates of slavery, were now the foremost supporters of the President's Emancipation Proclamation; therefore, it would not be well to disfranchise the white man for disloyalty. Nevada should not try to outdo the Federal Government. If the President could permit men, once disloyal, to return to civil affairs and vote, surely Nevada could not do less. If permitted to vote, would not a man who had taken the oath of amnesty be more loyal than ever? The debate became bitter, like the times, and members were saying that men who had taken up arms against the national Government deserved to be hanged. The discussion ceased somewhat abruptly; the vote was taken, and it was a tie. By the casting vote of the President, the word "disloyal" was rejected, and the right to vote was given to white males not under civil disabilities.[2]

A convention composed, like this one, almost wholly of natives of free States, and assembled in a part of the country with which few members had more than three

1 Debates, 95.
2 Debates, 104.

years' association, and going to the extreme of declaring the right of the national Government to coerce a State, might be expected to be more tolerant of the thought of negro suffrage. Had it assembled in South Carolina or Texas, it would be expected to repudiate the idea. This was a northern convention, and its attitude toward negro suffrage was hostile and uncompromising. However, the State had forbidden slavery. It was the price of admission into the Union, for the enabling act of March made religious freedom and the prohibition of slavery two of the conditions on which it could enter. On the twenty-seventh of July, the convention adjourned, and submitted its work to the people, who ratified it by a large majority.[1] On the last day of October Nevada was admitted by proclamation of the President. It was the thirty-sixth State in the Union, and the twenty-sixth to forbid slavery.

Another State was soon added to the free list. Tennessee consisted of two parts, the eastern and mountainous, loyal; the western, the lowlands, disloyal. It was one of the great battlegrounds of the war. The condition of the State, at this time, is, perhaps, best shown by the division of its military strength. To the Southern army it sent about one hundred and fifteen thousand men, and to the Northern, over fifty thousand, of whom twenty thousand were negroes.[2] It was not included in the Emancipation Proclamation, for it was largely under the control of its loyal citizens and the federal armies in 1862. The restoration of federal relations dates from the appointment of Andrew Johnson as military governor, on the third of November, preceding the proclamation.

[1] 10,375 to 1,284. Debates, p. xiv.

[2] The American Historical Magazine, Nashville, October, 1896, p. 309. The figures taken from a manuscript of General Marcus J. Wright and Official Records.

During the next two years, the portions of the State under the control of its loyal citizens and of national troops, gradually enlarged until they included nearly its whole area. The military governor early declared in favor of emancipation. "Get it into the new State constitution," wrote the President to him, "and there will be no such word as fail, for your case; and," he added, "the raising of colored troops, I think, will greatly help in every way."[1]

Johnson was eager for abolition, but its accomplishment depended upon military successes. Early in 1864,[2] with the aid of loyal citizens, he brought about an important meeting at Nashville, which declared in favor of a constitutional convention and abolition.[3] The meeting had its origin with the Executive Committee of loyal citizens, but it was made possible by the President's proclamation of amnesty, six weeks before. Loyal citizens were greatly divided over the slavery question. This subject and reconstruction were discussed at Knoxville in a quasi-convention, which met in April at the call of the State committee, but its members were divided between support of the Crittenden resolutions[4] and one for abolition. Volunteer delegates, claiming to represent some forty counties, met in another convention at Nashville on the fifth of September, and recommended that delegates to the constitutional convention be chosen at the presidential election. This was not done. The Executive Committee, basing their judgment on the amnesty proclamation, thought it time to issue a call for a convention to assemble in Nashville on the nineteenth of December, but at that

[1] Lincoln to Johnson, September 11, 1863. Lincoln's Works, II, 405.

[2] January 21.

[3] January 21, 1864; the resolutions are cited in Nicolay and Hay's Lincoln, VIII, 140-143.

[4] See Vol. II, pp. 618-621.

time Hood's army around Nashville compelled its postponement. It was appointed to meet on the ninth of January.[1]

The convention, at best, was a revolutionary body and would assemble upon a contingency, but its irregular organization and contingencies were practically overcome by the results of the battle of Nashville, which freed the State from Confederate control.[2] Following the precedent and the language of Louisiana, on the fourteenth of January it adopted a constitutional amendment abolishing slavery[3] and forbidding the legislature to make any laws recognizing the right of property in man.[4] On the twenty-second of February, the amendment was ratified by popular vote, and a Union governor and legislature were chosen to assume their offices on the fourth of March.[5] Thus the precedent of abolition and emancipation set by Missouri, in 1863, was followed within twelve months by Arkansas, Virginia, Louisiana, Maryland and Tennessee, all former slaveholding States; and two new States were added to the Union,—West Virginia, which had adopted gradual emancipation, and Nevada, which

[1] It appears that the committee chose at first the eighth day of January, the anniversary of the battle of New Orleans, for the day of the convention, but the day falling on Sunday, the 9th was taken. See R. L. McDonnald's Reconstruction Period in Tennessee, American Historical Magazine, Nashville, October, 1896, p. 311.

[2] 58 counties and some regiments were represented by about 467 delegates, who deliberated six days. Nicolay and Hay's Lincoln, Vol. VIII, p. 447. See also an account of the Convention in the Annual Cyclopedia for 1864 and 1865, article, Tennessee.

[3] By a vote practically of 161 to 113. Annual Cyclopedia, 1864, p. 768. See the account of Reconstruction in Tennessee in Report of the Joint Committee on Reconstruction, 39th Congress, 1st Session. H. R. Report No. 30, Part I, 128 pp.

[4] Introduction to The Laws of Tennessee of 1865, pp. iii-xiii.

[5] William G. Brownlow was chosen Governor. He was familiarly known as Parson Brownlow.

had prohibited slavery. Considered, in connection with all that had gone before, and all soon to come, the action of Tennessee was of great political promise. By the terms of the national Constitution, amendments must be ratified by three-fourths of the States. Tennessee was the twenty-seventh State to prohibit slavery, and completed the number whose assent was necessary to ratify an amendment abolishing the institution.

While emancipation was in progress in Louisiana, Maryland and Tennessee, Congress had been considering an amendment to the Constitution, abolishing slavery. The policy of President Lincoln was evidently to encourage the States to adopt gradual, or better, immediate abolition; and, when a sufficient number had acted, to have Congress propose an abolition amendment to the Constitution. It was a State institution and could not be obliterated without State consent. This fact regulated all the President's actions. He recognized this fact in his scheme for compensated emancipation in 1862. Again, in his annual message in 1863,[1] he declared "that the General Government had no lawful power to effect emancipation in any State," and that whatever the Government attempted toward the suppression of slavery, was done as a military measure. At this time, however, he expressed his trust that Congress would omit no fair opportunity of aiding the important steps which some of the States had taken toward abolition—meaning, more particularly, Missouri and Nevada. Great events came swiftly during the next six months, so that when the National Republican Convention met at Baltimore, in June, 1864, it boldly declared slavery to be the cause and the strength of the rebellion; pronounced it always and everywhere hostile to the principles of republican government, and, in the

[1] Lincoln's Works, II, 456.

name of justice and national safety, demanded its utter and complete extirpation from the soil of the Republic, by an amendment to the Constitution.[1] In November the re-election of Lincoln and of a House of Representatives having an overwhelming majority of Unionists, sufficiently indicated the temper of public opinion on the question.[2] But almost a year before his re-election, an amendment abolishing slavery had been proposed in Congress. The conviction expressed by the President, not long before his re-election had been gradually getting possession of the public mind, that no human power could subdue the rebellion, without the abolition of slavery.[3]

[1] Third Resolution in the platform of Johnson's National Convention, p. 225.

[2] The popular vote for Lincoln and Johnson in 1864 was 2,213,665; the electoral vote 212. The popular vote for McClellan and Pendleton was 1,832,237; the electoral vote was 21. The 39th Congress stood 10 Democrats and 42 Republicans in the Senate; 46 Democrats, 145 Republicans in the House.

[3] Interview with John T. Mills, August (15?), 1864. Lincoln's Works, II, 562.

CHAPTER III.

EMANCIPATION DISCUSSED IN CONGRESS IN THE FORM OF A THIRTEENTH AMENDMENT.

The Thirty-eighth Congress had been in session only a week when, on the fourteenth of December, James M. Ashley, a Representative from Ohio, introduced a bill to provide for submitting to the States an amendment to the Constitution, prohibiting slavery. On the same day, James F. Wilson, a Representative from Iowa, introduced a joint resolution to the same end. The bill and the joint resolution were read twice and referred to the Committee on the Judiciary.[1]

While these propositions were yet with the committee, the discussion of other subjects, and notably of the President's message, disclosed the real attitude of the House toward the question of abolition. An Illinois member[2] declared that the country was on the eve of universal emancipation. Congress could not go back, and must not halt; slavery must die, and the sooner it died the sooner there would be peace. The method of its extermination was clear. The border States by speedy action had decided for themselves. The Emancipation Proclamation had substantially abolished slavery in the region in rebellion; let Congress confirm it by prohibiting its reestablishment, and abolish it in that part of the rebel

[1] Congressional Globe, First Session, 38th Congress, 1863, pp. 19-21. Ashley's Bill prohibited slavery or involuntary servitude in the States or Territories owned or acquired by the United States. Wilson's Resolution read, "Section 1, Slavery being incompatible with free government is forever prohibited in the United States; and involuntary servitude shall be permitted only as punishment for crime. Section 2, Congress shall have power to enforce the foregoing section of this article by proper legislation."

[2] Isaac N. Arnold, January 6, 1864; Globe, p. 115.

States not included in the Proclamation. Slavery being thus everywhere abolished, amend the Constitution, by prohibiting its re-establishment, or existence in any part of the United States. In the exercise of its war powers, the government could abolish slavery, in time of war, wherever and whenever it might be necessary. The public defence, the general welfare, domestic tranquillity and the establishment of justice, demanded it. The only government existing in the United States was that of the Nation, as exercised by Congress and the President. The Constitution authorized Congress to make all laws necessary and proper for the execution of its powers. It also required the United States to guarantee to every State in the Union a republican form of government. If the emancipation of slaves in the rebel States would tend to the establishment, there, of a republican form, who could deny the power of Congress to emancipate? All means plainly adapted to the end, which were not prohibited by the Constitution, were lawful.[1] The death of American slavery would work the regeneration of the Nation.[2] This was advanced ground which it was doubtful that the majority of the House were at this time ready to occupy.

While the two propositions were yet with the Judiciary Committee of the House, the Senate took up the subject. There was a peculiar propriety in the request of John B. Henderson, a Senator from Missouri, who, on the eleventh of January, 1864, by unanimous consent, introduced a joint resolution[3] proposing an amendment for the aboli-

[1] 4 Wheaton, p. 421.

[2] "This great statesman, this simple unpretending man (Mr. Lincoln),I believe to be the instrument raised up by God to work out the regeneration of the Nation by the death of American slavery." Arnold's Speech on the Message, Globe, p. 117.

[3] Globe, p. 145. A later resolution of his became the fifteenth amendment; see pp. 440-445, and 129, note.

tion of slavery. It was referred to the Committee on Judiciary, of which Lyman Trumbull of Illinois was chairman; but no word was spoken, as yet, in the House, and Henderson's resolution was apparently buried in committee. It was not until the eighth of February that the subject again came up, when Charles Sumner offered an amendment in the form of a joint resolution that "everywhere within the limits of the United States, and of each State or territory thereof, all persons are equal before the law, so that no person can hold another as a slave," and he moved that it be referred to the Select Committee on Slavery and Freedmen, of which he was chairman. Mr. Trumbull at once remarked that the Judiciary Committee was the proper one to which to refer bills to change the Constitution; that already several propositions for the prohibition of slavery were before it, including Senator Henderson's, and would it not be well if all were considered together? Mr. Sumner thought that propositions affecting slavery should rather go to the Select Committee on Slavery, but soon consented that the proposed amendment go to the Judiciary Committee, expressing the hope, at the same time, that it would act upon it soon. It has been thought that this rivalry between the two committees hastened action upon the subject.[1]

Petitions for the abolition of slavery were now multiplying every day in both Houses. They came from individuals and societies, secular and religious, and from State legislatures, and their increase indicated the trend of public thought. The Judiciary Committee reported on the tenth,[2] and the language of the amendment which it proposed was neither that of Mr. Henderson nor of Mr.

[1] Nicolay and Hay's Lincoln, X, 75.
[2] Globe, p. 503. January, 1864.

Sumner, but of the Ordinance of 1787.[1] Mr. Trumbull opened the brief discussion on the twenty-eighth.[2] Slavery, he said, had been the cause of most of the strife and sectional contests of the country. The Emancipation Proclamation and the acts of Congress confiscating the property of persons in rebellion, and freeing all slaves allowed by their masters to participate in it, rested on sound constitutional authority; but while these freed many slaves, they did not abolish slavery. Some believed that it could be abolished by an act of Congress, as the numerous petitions asking for such a law indicated; but it was an admitted axiom of the government that Congress had not the right to interfere with slavery in the States. Congress did not depend upon negroes for the overthrow of the rebellion. It had unlimited authority to raise armies by drafting into its service all free men in the country capable of bearing arms. Though it had authority for prosecuting the war, it had no constitutional authority to abolish slavery; that must be done by means of an amendment, ratified by the requisite number of States, —otherwise there would be nothing in the Constitution to prevent any State from re-establishing it. Of the thirty-six States in the Union, the six former slaveholding,— which had recently abolished slavery,—together with the free States, might be confidently counted as sufficiently united to pass the amendment. It was assumed that all

[1] Senator Henderson's amendment read: "Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States." The Trumbull amendment read: "Article III, Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction. Section 2, Congress shall have power to enforce this Article by proper legislation." Globe, March 28, p. 1313.

[2] Globe, pp. 1313-1314.

the free States would adopt it. The few, which hitherto had disfavored the idea, had objected on constitutional grounds, denying the authority of the government to interfere with it; but no free State would deny the power of the people to abolish it by amendment to the Constitution. It was not claimed that the ratification of this amendment would be an end to the rebellion; that consummation must be the work of the national armies; but these would soon vindicate the authority of the Constitution; the Union would soon be restored and freedom everywhere proclaimed.

Senator Wilson, of Massachusetts, characterized the proposed amendment as the crowning act of a series for the restriction and extinction of slavery in America;[1] and with eloquence rarely heard even in the days of the Civil war, when the Nation was constantly thrilled by words of lofty patriotism, he depicted the splendid consequences of the moral victory for the American people that must follow abolition.[2] Senator Saulsbury, of Delaware, denied the constitutional authority of the General Government to interfere with the rights of property,—which the amendment must do. Even if ratified by the requisite number of States, it would not be binding upon others that refused their assent, for slavery was a domestic, a State institution. But could twenty-eight States be found that would ratify it? Surely its friends would not expect Arkansas, Tennessee, North Carolina and Louisiana to favor it. Take away the federal soldiers from these States, and not one in fifty of their citizens would approve the amendment, or recognize the authority of Congress; the position of the supporters of the measure in Congress, he said, was wholly unsound.[3] "The time for such an

[1] Globe, p. 1324.
[2] Globe, pp. 1319-1324.
[3] Globe, pp. 1364-1367.

amendment is come," was the brief reply of Senator Clark, of New Hampshire.[1]

It is noticeable that, as yet, no member urged abolition on the economic grounds familiar to us in the debates in Missouri, Louisiana and Maryland. In Congress, the question was one chiefly of authority. Less importance was to be attached to the opinions of Senators from States, like New Hampshire, Vermont and Massachusetts, which long had been friendly to the African and had earnestly advocated his rights. These States and others in the North less radical might be counted on for the amendment, but its fate would depend upon the vote of the border States. It was, therefore, amidst great expectation, and with profound interest, that Reverdy Johnson of Maryland spoke on the resolution, on the fifth of April.[2] If, said he, the founders of the government could have foreseen the evil consequences of slavery, they doubtless would have provided for its early removal. Whether or not the cause of the war, slavery was now identified with those in arms against the government. Could the President abolish the institution? There was no authority for the supposition. He must depend upon Congress for the exercise of the war power. It was futile to attempt to emancipate slaves in the seceding States by means of a proclamation with which the armies of the United States did not march from day to day, and which they did not practically execute by getting possession and control of the slaves. The question involved the rights of belligerents, and it was accepted law that the state of war does not authorize the belligerent to emancipate the slaves of his enemy.

This was the opinion held by John Quincy Adams in

1 Globe, pp. 1367-1370.
2 Globe, pp. 1419-1424.

his controversy with England,[1] in which he had maintained that slaves were private property and entitled by the laws of war to exemption from capture.[2] The Senator now declared that he held of less value the opinion which Adams once expressed in debate in the House of Representatives, that slavery might be abolished by means of the war power, in a certain state of public affairs. Congress, by the Constitution, is clothed with authority to declare war. Some had maintained that, under this authority, slaves might be emancipated, but in what manner? Nobody would contend that, if Congress declared the slaves in seceded States free, and later, the independence of these States was recognized, that they would be free. Moreover this power must be exercised over the loyal as well as the disloyal States, but the latter were out of the Union; peace, and their domestic institutions, therefore, were beyond the reach of the government of the United States. Because several States had seceded, and, to some extent, had acquired the rights of belligerents toward the United States, did it follow that the government, in the exercise of its power to suppress rebellion and reinstate its authority, could interfere with the loyal States of Maryland, Kentucky or Missouri?

One man would contend that the admitted sovereignty of the States forbade any amendment intrenching upon their authority; another affirmed that the rights of prop-

[1] Dispatch of August 22, 1815. "The emancipation of negro slaves is not among the acts of legitimate war. As relates to the owners it is a destruction of private property not warranted by the usages of war." Adams, Secretary of State, to Rush, July 7, 1820, Instruction to Ministers. Wharton's International Law, Second Edition, Vol. III, p. 250.

[2] "It is otherwise when such slaves are material part of the enemies' resources, in which case they become the contraband, and may be emancipated." See Wharton, Ib., pp. 250-251, where the authorities in support of this doctrine are given.

erty excluded the General Government from interference. The first assertion was fully answered by the Supreme Court, that the sovereignty of the people of the United States, to the extent of the powers conferred upon its Government, and the sovereignty conferred upon the governments of the States by their respective people, were precisely the same, and no more than it would have been if they had been framed and adopted at the same time.[1] From this it would follow that each government was invested with the portion of the sovereignty which the people created. The objection, that the United States had no power to interfere with slavery as a property right, depended on the truth of the saying, that it was "not a subject for political interference."[2] But did anyone doubt that slavery could have been abolished by the Constitution, originally? Did not slavery prevent the realization of the ends proposed by the Constitution, as stated in its preamble? In the presence of the violation of this purpose, the so-called rights of property vanished. No one claimed that the sovereign power of the American people had diminished with the passage of time; clearly the people could do now what they might have done in 1788. This part of the Senator's speech recalls Madison's defence of the powers of the Federal Convention in the Federalist[3] that it could propose anything to the people for ratification. The practical objection to the measure was the condition of the slaves. They were in absolute ignorance for which they were not responsible, and which should not be suffered to prevent the adoption of the amendment.

[1] McCulloch vs. Maryland; 4 Wheaton, p. 316 (1819). Booth vs. The United States, 21 Howard, p. 506.

[2] Senator Saulsbury had maintained this.

[3] Number XL, by Madison; Hamilton in the Debates, Elliot, V, 199.

The fate of the amendment in the Senate was quite clear from the first, but an effort was now made to amend the resolution so as to exclude negroes from places of trust or profit under the United States, and to make them ineligible to civil or military offices;[1] another, to exclude from its operation slaves in States which forbade free negroes a residence;[2] a third, to provide for compensation for slaves;[3] and a fourth, to secure the distribution of the freedmen, after the amendment should take effect, among the States and territories, according to the proportion which the white population of each bore to the aggregate population of African descent; but none of these suggestions received a half dozen votes.[4]

No less interesting and significant was the opinion of Senator Henderson of Missouri. The war, he said, had wrought a great change in the opinions of Union men in the slaveholding States. Before the war, it was generally admitted that the Union could not continue unless the whole subject of slavery was left to the States, a notion deriving its chief strength from the consideration which the North felt toward the Union men of the South, who wished slavery to continue. All this had been changed. Discarding the question of fixing responsibility for the war, whether on the North or on the South, the civilized world, he said, believed that slavery was the real cause. Under a supposed necessity for Union, a great wrong had been admitted originally into the organic law. There were but two sides to the question before the country: Union

[1] Proposed by Garrett Davis of Kentucky; rejected 32 to 5.

[2] Proposed by the same, but only four members seconded the call for yeas and nays.

[3] Proposed by N. N. Powell of Kentucky, but supported only by himself and his colleagues; nays 34.

[4] Proposed by Senator Davis of Kentucky, but only three members answered the call for yeas and nays.

without slavery, or the immediate and unconditional acknowledgment of the Southern Confederacy. The price of the Union must be slavery abolition. The larger proportion of the Union men in the border States were in favor of it. Those there opposed to it would at once acquiesce, because it would be law. Union men in the seceded States would rejoice, for it was only on an anti-slavery platform that they hoped for an ascendency in their State governments. The freedom of the slave was the logic of events and no party could withstand its irresistible force. The cost of the war, in life and treasure, demanded the amendment. The whole effort of Congress, from the opening of the struggle, had been to devise ways and means to cripple slavery. The determination to abolish it, in some way constituted the strongest reason for abolishing it legally and without violation to rights. It was absurd to insist that Congress could abolish slavery in a territory but not in a State.

The Senate was acting upon the idea that the States were all in the Union. It refused to do business without the presence of thirty-six Senators, and a majority of all, if the Senate was full. But even admitting that the seceding States were out of the Union, a proposition to amend the Constitution might be proposed by two-thirds of a bare majority of the members elected to the two Houses of Congress, and be ratified by eighteen States, a bare majority of the whole number; "thus the Constitution would be amended without consulting a State in the Union to be affected by it, or a citizen of any such State." If they were in the Union and the slavery question were to be settled by an amendment which had received the sanction of twenty-seven States, it would be settled beyond all judicial cavil. The public mind would rest in the conviction that the evil was abolished. To abolish it

in any other way must be attended with doubts as to its legality. If, as had been said, some of the States were out of the Union, and now had two governments, Congress could recognize the true one. It had been said that most evil consequences would follow abolition, but fear of this should not prevent an act of simple justice. Whatever these evils might prove to be, they were not now the problem to be solved. The only means for bringing the war to a speedy end and restoring the Union was by an amendment abolishing slavery, and this rested with Congress and the States.[1] The long, able and eloquent speech of the Missouri Senator was a plea for peace, for which the abolition amendment would be a small price.

But of all the speeches to which the Senate listened, none was more learned than that delivered by Charles Sumner, on the eighth of April,[2] which in spirit and style was like his earlier philippics against slavery. Of greatest immediate interest was his plea for the adoption of the phraseology, that "all persons are equal before the law." He cited the first constitution of France, which proclaimed this immortal doctrine, as a precedent which the people of the United States might well follow. He dwelt upon the history of the French people, who, in their later constitutions of government, had proclaimed the same great doctrine.[3] "It will be felt," said he, "that this expression,—'equal before the law'—gives precision to

1 Globe, pp. 1459-1465. April 7, 1864.

2 Globe, pp. 1479-1483.

3 September 3-13. Art. Ler. Les hommes naissent et demeurent libres et égaux en droits. Helie. Les Constitution, De La France, p. 268; 24 Juin, 1793. Art. Ler. 3, Tous les hommes sont égaux par la nature et devant la loi. Id., p. 376. Charte Constitutionelle du 4, Juin, 1814. Art. Ler. Les Français sont égaux devant la loi, quels que soient d'ailleurs leurs titres et leurs rangs. Id., p. 886.

that idea of human rights which is enunciated in our Declaration of Independence."[1] Sumner concluded his plea to substitute the French clause for the language of the Jeffersonian ordinance, with the request that if the language of the Ordinance of 1787 was to be followed, it should be followed exactly.[2] The Senator's manner was not always free from hauteur; it was not free from it now.

The language of the amendment was of the highest importance. This was pointed out cogently and firmly by Senator Howard, of Michigan. It was immaterial, he said, whether the words proposed by the Senator from Massachusetts were, that all persons are "free" or are "equal" before the law. In a legal and technical sense that language was totally insignificant and meaningless as a clause of the Constitution. What effect would it have in law, or in courts of justice? The phrase "equal and free before the law" was unknown to our jurisprudence, and would apply equally to a man or to a woman. The language of the French constitution could not be made applicable to American conditions. Its original purpose, in 1791, was to abolish privileged classes; and to enable Frenchmen to reach positions of eminence and honor in the French government; but it was never intended as a means of abolishing slavery. The Convention of 1794 abolished slavery by a separate decree, which expressly put an end to it. Senator Howard preferred to dismiss all reference to French constitutions or French codes, and go back to the good old Anglo-Saxon language

[1] Globe, 1483.

[2] The language of the ordinance, Article 6th, is, "There shall be neither slavery or involuntary servitude in the States or Territories, otherwise than in punishment of crime whereof the parties shall have been duly convicted." Preston's Documents, p. 250.

employed by our Fathers in the Ordinance of 1787, for an expression which had been adjudicated upon repeatedly, and gave a phrase peculiarly near and dear to the people of the Northwestern territory.[1] The clause of the Ordinance of 1787 was well understood by the people of the United States.

The roll was called, and the result was the adoption of the joint resolution by a vote of thirty-eight to six.[2] Among those concurring were two Democrats, Reverdy Johnson of Maryland, and James W. Nesmith of Oregon,[3] so that the resolution was carried by more than the two-thirds required by the Constitution.[4]

Seven weeks passed before the joint resolution was brought up in the House, and its treatment there was in contrast to its treatment in the Senate. No discussion preceded the vote cast on the thirty-first of May, which though amply large enough to save the resolution from rejection, lacked many votes of being the requisite number for adopting it.[5] But the vote, though foreshadowing the fate of the amendment at this session, indicated that it might be discussed. Discussion, however, was brief. It was said that the resolution struck at the original compact between the States; that it was to be forced

[1] Globe, pp. 1488-1489.

[2] Globe, p. 1490.

[3] The title was amended to read: "A Joint Resolution Submitting to the Legislatures of the Several States a Proposition to Amend the Constitution of the United States." The six Senators voting in the negative were Messrs. Davis of Kentucky, Hendricks of Indiana, McDougall of California, Powell of Kentucky, Riddle of Delaware, and Saulsbury of Delaware.

[4] Nicolay and Hay's Lincoln, X, 77.

[5] The vote upon the resolution was 55 yeas and 7 nays. Globe, May 31, 1864, p. 2612. The House consisted at this time of 102 Republicans, 75 Democrats, and 9 Unionists from the border States.

through by a political dynasty; that it would forever disrupt the Union, and that the slavery issue, which the resolution sought to settle thus finally in a summary manner by immediate abolition, was legitimately merged in the higher issue of the right of the States to control their domestic affairs, and to fix, each for itself, the status not only of the negro, but of all the people who dwelt within their borders.[1]

For the first time in our history, it was now proposed to make a change in our Constitution, which, if effective, would interfere with the reserved rights of the States. Could three-fourths, under the power of the amendment, overturn the institutions, subvert the authority, and change the condition of the other States? If so, the States might as well have surrendered all their sovereignty to the General Government at the outset, and the tenth amendment, declaratory of their reserved rights, was meaningless.[2] The real question, said Fernando Wood, was whether the whole structure and theory of our government should be altered by changing its basis. It was not the time while in the midst of a fearful civil war to change the organic law. The amendment was especially objectionable because it made social interests the subject of governmental action. It was, moreover, a breach of good faith with the States, and utterly inexpedient. It struck immediately at property, and violated the rights of the people. It was a vindictive law, punishing individuals for the offences of communities; it was wholly beyond the powers of the Government.[3] As, one after another,

[1] Anson Herrick of New York, May 31, 1864. Globe, pp. 2615-2618.

[2] John L. V. Pruyn of New York, June 14, 1864. Globe, pp. 2939-40.

[3] Globe, June 14, 2940-2942.

able representatives arose and attacked the measure, it seemed to be deserted by its friends, or to have none. But its friends, though at this time in the minority, were not silent.

It had been said by its opponents, that the amendment, if adopted, would prolong the war. "I do not believe the adoption would prolong the war one day," answered Wheeler, a Democratic member from Wisconsin. The North could not do otherwise than vote to maintain the integrity of the Nation; end the controversy by conquering the Southern armies and the whole Southern country; but not exterminate its people. This done, slavery would be destroyed. It would be impossible to return to slavery slaves once actually freed by military operation; the more prolonged and stubborn the resistance, the more complete the destruction of the institution. Therefore, the Constitution should be amended so as to prohibit slavery, and to give Congress power to carry the prohibition into effect. The States that had pretended to secede had voluntarily relinquished the protection which the Constitution gave to their peculiar institution;[1] therefore no attempt should be made to force that protection upon them against their will. But the loyal slave States should be given time to abolish slavery in their own way.

And now was heard for the first time during this debate an echo of that economic argument, which had carried conviction in Missouri, in Louisiana and in Maryland. It was idle to speculate as to the future condition of the Southern States. At no distant period they would be brought into subjection to the government against which they had rebelled. "In accomplishing this end," said Wheeler, "undoubtedly the character of their population is to be materially changed; not that the Southern

[1] Compare with the debate in Maryland, ante, pp. 98-113.

people are to be exterminated, but the emigration there from the North and from Europe, which will surely follow the return of peace and the substitution of free for slave labor, will change entirely the character of the majority of the people who will have the controlling influence in these States. Enterprise, industry and economy will develop the natural resources of the country, and, when this is done, we can scarcely conceive the advance that will be made in these States, in wealth, population and material prosperity, and we have no reason to doubt that equal advance will be made in intelligence and morality."[1]

On the next day the vote was cast. Twenty-three members abstained from voting; sixty-five voted nay, and ninety-three, yea; but the resolution had failed to receive the required two-thirds. During the roll call, Mr. Ashley, who had introduced the original resolution, foreseeing the end, changed his vote from the affirmative to the negative, for the purpose of submitting, at the proper time, a motion to reconsider.[2]

Just a week before this vote was taken, the Republican National Convention at Baltimore adjourned. Its delegates were in closer touch with public opinion than was the House of Representatives. In calling it to order, Senator Edwin D. Morgan of New York, chairman of the National Executive Committee, told the convention that it would fall short of accomplishing its great mission, unless it should declare for an amendment to the Constitu-

[1] Globe, June 14, 1864, Appendix, p. 126.

[2] Globe, June 15, 1864, p. 25-95. Those voting against the resolution were all Democrats; four Democrats voted for it, Moses T. Odell and John A. Griswold of New York, Joseph Bailey of Pennsylvania, and Ezra Wheeler of Wisconsin, the only Democrat who made a speech in its favor. Nicolay and Hay's Lincoln, X, 78, with note.

tion, prohibiting slavery.[1] This utterance was received with prolonged applause, but enthusiasm would have been greater had the delegates known that Lincoln was the author of the suggestion. However, it at once captivated the delegates. They responded to the appeal of the Reverend Doctor Robert J. Breckenridge, a delegate from Kentucky, that the whole power of the government, both for war and peace, and all the practical power that the people of the United States would give them should be applied to "exterminate and extinguish slavery."[2] The thought was re-echoed by the permanent chairman, William Dennison, of Ohio, who declared slavery incompatible with the rights of humanity and the permanent peace of the country, and that with the termination of the war, and, as much speedier as possible, it must be made to cease forever in every State and territory in the Union.[3] The plank in the platform favoring the constitutional amendment, the natural effect of a controlling idea, it was soon known, originated with Lincoln.[4]

The re-election of the President, and of a House, the majority of whose members professed the faith of the Baltimore platform, was evidence of the wishes of the country. Lincoln sometimes led, but usually followed public opinion; like Jefferson, he was by nature a politician, and, without doubt, the most masterful in our history. He only reflected public opinion now in his annual message of 1864. The amendment abolishing slavery had

[1] Johnson's, First Three Republican National Conventions, p. 177.

[2] Johnson's, First Three Republican National Conventions, p. 180.

[3] Id., p. 197.

[4] Mr. Lincoln said that he had suggested to Senator Morgan to put the idea into his opening speech. Nicolay and Hay's Lincoln, X, 79.

passed the Senate, but failed for lack of the requisite two-thirds vote in the House of Representatives. The second session of the Thirty-eighth Congress enrolled nearly the same members as the first, and, without questioning the patriotism of those who stood in opposition, he ventured to recommend the reconsideration and passage of the measure. Of course the abstract question was not changed, but an intervening election had shown, almost certainly, that the next Congress would pass the measure if this one did not; hence it was only a question of time as to when the proposed amendment would go to the States for their action. As it was to go, at all events, why not agree that the sooner the better? The President did not claim that the election imposed duties upon members to change their views or their votes any further than, as it was an additional element to be considered, which their judgment might approve.

The election had expressed the views of the people, now for the first time heard upon the question. In a great national crisis such as this, unanimity of action among those seeking a common end was very desirable—almost indispensable, and yet no approach to such unanimity was attainable unless some deference was paid to the will of the majority, simply because it was the will of the majority. In this case the common end was the maintenance of the Union; and among the means to secure it the public will, through the election, had been most clearly declared in favor of the amendment.[1]

Nine days later, James M. Ashley gave notice that, on the sixth of January, he proposed to call up the motion to reconsider the vote, by which the joint resolution had

[1] Annual Message to Congress, December 6, 1864. Lincoln's Works, II, 612-613. Mr. Lincoln's words are closely followed.

been rejected.[1] On that day he reopened the question in a powerful speech,[2] whose major premise was that slavery was wrong and criminal; that it was the duty of Congress to abolish it, and that Congress had the power to propose amendments, as was explicitly stated in the Constitution itself.[3] The first question to settle was, what constituted two-thirds of both Houses: whether it consisted of two-thirds of the entire number of members to which all the States would be entitled, including those in rebellion, or two-thirds of the members who had been elected and qualified. This question the House itself had settled, in deciding that the majority of members elected and recognized by the House made a constitutional quorum.[4]

It had been said, that even if the amendment was proposed by two-thirds of Congress, and ratified by three-fourths of the States, it would not be binding upon dissenting States, because it invaded their reserved rights.[5] But this position was indefensible by the plain language of the Constitution; Congress might propose, and three-fourths of the States might adopt any amendment, republican in character and consistent with the continued existence of the nation, excepting in the two particulars named in the Constitution, one, affecting the equality of the

[1] Globe, December 15, 1864, Second Session, 38th Congress, p. 53.

[2] Globe, January 6, 1865, pp. 138-141.

[3] Article 5.

[4] The clauses of the Constitution pertaining to a quorum of the House of Representatives, Article I, Section 2, Clause 1; Section 5, Clause I. It was decided during the 37th Congress, to which several of the States had failed to send representatives, Hon. Galusha A. Grow, Speaker; that the majority of members chosen constitutes a quorum to do business. Journal, I, p. 117. See Rules and Practice of the House, title, Quorum.

[5] George H. Pendleton of Ohio, June 15, 1864, Globe, p. 2993.

States in the Senate;[1] the other, apportioning taxation.[2] To claim that our government was a Confederation and the States sovereign seemed an absurdity too transparent for serious argument. Both the law and the history of the Constitution were against the doctrine. Nowhere did the Constitution clothe the States with the attribute of a sovereign power; but, on the contrary, rigorously maintained the supreme authority of the National Government.[3]

The so-called "sweeping clause"[4] meant that the framers of the Constitution intended that the Government should be intrusted with the interpretation of the instrument, not only as to the powers delegated by Congress, but also as to the departments of the Government; "they never intended that any State or parts of States, nor the officials of State governments, should be competent in any capacity to judge of the infraction of the Constitution, by any department of the Government, or be the final judge of the propriety of any law passed by Congress. The provision imposing upon Congress the duty of guaranteeing a republican form of government[5] to the States sufficiently proved, he said, the total indefensibility of the dogma of State sovereignty. It was declared that the requisite number of States could not be secured for the adoption of the proposed amendment.

To this, it was replied that Congress did not limit the time of ratification, nor had it authentically declared that the ratification by twenty-seven States was necessary. Ratification by three-fourths of the States recognized by Congress would be sufficient. Congress could not recognize a State as a member of the Union unless its civil

[1] Article V.
[2] Article I, Section 2, Clause III.
[3] Article VI, Clause II. Article I, Section 8, Clause XVI.
[4] Article I, Section 8, Clause XVIII.
[5] Article IV, Section 4.

government was organized and administered in harmony with the Constitution. Such a State government and no other could be a Constitutional government. The United States were not a confederation, but a Nation, and the first and highest allegiance of its citizens was due to the national government. But the citizen owed no allegiance to laws unconstitutionally enacted by his local government. The Constitution gave the National Government ample authority to protect itself from a minority confederating against it. The financial effect of the amendment could not be overlooked; its passage would be a guarantee of peace, unity, prosperity and power, and would result in a national credit both at home and abroad which no victory of our armies could give. It would be a pledge that the labor of our country should be free, and would secure the free working men of Europe, who were seeking homes in America, from longer exclusion from a large portion of our country. Thus, in a final analysis, the fundamental reason for abolishing slavery was economic.

The debate now became general, and elaborate speeches on both sides were delivered during the next ten days. There was much repetition of arguments, as usual on such occasions, but no phase of the question was left unexamined.[1] It is unnecessary here to give more than a

[1] Thirty-three important speeches were delivered, eighteen for and fifteen against the resolution, and with the exception of four, which were delivered on the 31st of January, these were all spoken from the 6th to the 16th of the month. They were delivered as follows:

In favor of the resolution: Godlove S. Orth of Indiana, January 6, Globe, pp. 144-146; Thomas T. Davis of New York, January 7, Globe, pp. 154-155; George H. Yeaman of Kentucky, Globe, 168-172; Justin S. Morrill of Vermont, January 9, Globe, 172-175; John A. Kasson of Iowa, January 10, Globe, 190-193; Austin A. King of Missouri, January 10, Globe 195-199; Josiah B. Grinnell

brief summary of the conflicting ideas. The amendment, it was said, would centralize all local and municipal authority in the Federal Government. It was replied that emancipation had been going on for two or three years, and no municipal rights of the citizens had been violated.[1] Stop the war, save the Union and then make any necessary amendment, urged the opponents to the measure. Its supporters replied that the amendment itself would be a powerful engine for peace and the restoration of the Union. The amendment would immolate the Constitution;[2] to which it was answered that the Constitution and the Union could be saved only by its adoption; emancipation was the true conservative policy of the country.[3]

of Iowa, January 10, Globe, 199-200; John F. Farnsworth of Illinois, January 10, Globe, 200-201; John R. McBride of Oregon, January 10, Globe, 201-202; Nathaniel Smithers of Delaware, January 11, Globe, 216-217; John M. Broomall of Pennsylvania, January 11, Globe, 220-221; Green C. Smith of Kentucky, January 12, Globe, 234-238; Frederick E. Woodbridge of Vermont, January 12, Globe, 242-244; M. Russell Thayer, January 12, Globe, 244-246; James S. Rollins of Missouri, January 14, Globe, 258-264; William H. Miller of Pennsylvania, January 31, Globe, 524; Anson Herrick of New York, January 31, Globe, 524-528.

Against the resolution: George Bliss of Ohio, January 6, Globe, 149-150; Andrew J. Rodgers, January 7, Globe, 150-154; John L. V. Pruyn of New York; Elijah Ward of New York, January 9, Globe, 175-178; Robery Mallory of Kentucky, January 9, Globe, 178-181; Brutis J. Clay of Kentucky, January 9, Globe, 181-183; Fernando Wood of New York, January 10, Globe, 193-195; Charles A. Eldridge of Wisconsin, January 1, Globe, 195; C. A. White of Ohio, January 11, Globe, 214-216; William S. Holman of Indiana, January 11, Globe, 217-219; James A. Cravans of Indiana, January 11, Globe, 219-220; George H. Pendleton of Ohio, January 11, Globe, 221-225; S. S. Cox of Ohio, January 12, Globe, 238-242; Alexander Coffroth of Pennsylvania, January 31, Globe, 523; Martin Kalbfleish of New York, January 31, Globe, 528-530.

1 Orth, Globe, 14.

2 Bliss, Globe, 149.

3 Yeaman of Kentucky, Globe, 170-172.

It was time to hold out the olive branch and exhibit a conciliatory spirit.[1] Conciliation, it was answered, must rest on justice.[2] Even if the amendment was ratified, said another, it would not remove disturbing elements in the Nation;[3] but, was the reply, it would remove slavery, the chief disturbing element of all. The measure was not only unconstitutional, but impolitic and inexpedient.[4] As to its expediency, it was answered, had not the Baltimore Convention put the question to the country, and had not the people expressed their will by the late elections? As to its constitutionality, did not the writings of the fathers and the whole history of the country sustain it?[5] Were not the instincts of the American people a sufficient answer?

Again, it was said, that the amendment would produce greater evils than it cured, for it would destroy the Union.[6] On the contrary, said its supporters, it would give to the Nation the heritage of perpetuity based upon freedom and justice to millions.[7] But if slavery was abolished, it should be by the States, not by the Federal Government.[8] To this it was replied, that the continuance of the States with republican forms of government was guaranteed by the General Government, and that the abolition of slavery would mean the salvation of both the States and the Nation.

By the side of this bill, said Holman, a Democratic

1 Ward, Globe, 176.
2 Yeaman, supra.
3 Mallory, Globe, 178-180.
4 Holman and Pendleton, Globe, 217-219, 221-225.
5 Kasson, Globe, 189-194; Farnsworth, Globe, 201; Smithers, Globe, 216.
6 Fernando Wood, Globe, 194.
7 Grinnell, Globe, 200.
8 C. A. White, Globe, 214.

member from Indiana, was another which indicated the whole policy of the party in power. It was the entering wedge to the idea that no class of men could be secure unless they were citizens of the republic and were invested with the right of suffrage. The ultimate purpose of the amendment was to reorganize civil government in the South. "In my judgment," said he, "the fate of slavery is sealed; it dies by the rebellious hand of its votaries, untouched by the hand of the law;" but he opposed the amendment as "unnecessary and a dangerous precedent without benefit."[1] On the ground of humanity, said another, the amendment should be rejected: it would be a cruel act to turn all those negroes upon the world.[2] "It is strange," answered Broomall of Pennsylvania, "that an appeal should be made to humanity in favor of an institution which allows the husband to be separated from the wife; the child to be taken from the mother; the very children of the slaveholder himself to be sold to satisfy his merciless creditors."[3] But the principal objection was uttered by George H. Pendleton, of Ohio, the recently defeated candidate for Vice-President, and the leader of his party in the House. The amendment should be rejected, he said, not because it came within the two clauses of limitations in the Constitution mentioned by Ashley, but because republicanism lies at the very foundation of our system of government; to overthrow that idea would be not to amend, but to subvert, the Constitution.

If three-fourths of the States should undertake to pass the amendment, and one State dissented, it would have a right to resist by force. Could three-fourths of the States make an amendment which should prohibit a State from

[1] Globe, 219.
[2] Mallory of Kentucky, January 9, Globe, 179.
[3] January 11, Globe, 221.

having two Houses in its legislature? Yet this was not prohibited in the Constitution. The reason was because the equality of the States and the control of their internal affairs by themselves only were at the foundation of our system; three-fourths of the States could not amend the Constitution so as to make one-fourth bear all the taxes; or to divide the territory of one-fourth among the rest; or to make the northern States slaveholding; yet none of these things were forbidden in the Constitution. The only answer that could be made to this argument was founded on an entirely different interpretation of the origin, the scope, and the nature of the National Government than that which Pendleton and his political associates maintained. It was the answer which Mr. Ashley gave at the opening of the debate.

Foreseeing the probable result of the vote, the opponents of the amendment resorted to the usual parliamentary tactics for delay, but in vain. On the last day of January the vote was reached. By a vote of nearly two to one, the House agreed to reconsider its action of the fifteenth of June.[1] By a large majority the June resolution was then adopted.[2] The victory was not strictly a party victory. The four Democrats who had supported the resolution in June now supported it again and were joined by thirteen of their party colleagues.[3] Nineteen representatives from the border States voted for the amendment, of whom at

[1] Yeas 112, nays 57, not voting 13; Globe, January 31, 1865, 530-531.

[2] Yeas 119, nays 5, not voting 8. Id., 531.

[3] James E. English, Connecticut; John Ganson, Anson Herrick, Horner A. Nelson, William Bradford, John B. Steel of New York; Alexander H. Colfroth, Archibald McAllister of Pennsylvania; Wells A. Hutchins of Ohio; Augustine C. Baldwin of Michigan; George H. Yeaman of Kentucky; Austin A. King and James S. Rollins of Missouri, Globe, 531.

least five had supported it by powerful speeches. The eight absentees, all of whom were Democrats, and who were not paired, contributed, perhaps involuntarily to the adoption.

The epoch-making resolution has long been imputed, in popular tradition, to a lofty sense of morality imbuing the members of the Thirty-eighth Congress. The morality of men in public life is doubtless most justly judged from their public acts. By far the greater number of members who voted for the resolution had long been opponents of slavery, and, of late years, had eagerly awaited an opportunity to aid in abolishing it. There were a few members who supported the resolution for selfish, personal reasons. A few were actuated by the promise of offices for their friends and supporters, and a few were controlled by powerful interests among their constituents.[1]

The vote was cast at four o'clock in the afternoon of the thirty-first of January. The Speaker, Schuyler Colfax, was the last member to vote, and he voted "yea." As the roll-call proceeded excitement deepened and applause was with difficulty suppressed. When the Speaker announced that the amendment had passed, enthusiasm burst forth; members on the Republican side sprang to their feet and, regardless of parliamentary rules, applauded with cheers and clapping of hands. "The example was followed by the male spectators in the gallery, which was crowded, who waved their hats and

[1] There is evidence, from oral testimony which I have heard, that for their support of the resolution, certain members, and there were Republicans and Democrats among them, were to have the disposal of certain offices, among which was the Collectorship of the Port of New York. The part which the Camden and Amboy Railroad played in the case, and the effort to secure the influence of the President to have Mr. Sumner drop the Raritan bill, are mentioned, with some detail, by Nicolay and Hay in their Life of Lincoln, X, 84-85.

cheered loud and long, while the ladies, hundreds of whom were present, arose in their seats, and waved their handkerchiefs, adding to the general excitement and intense interest of the scene; this lasted several minutes."[1] Amidst the enthusiasm, the voice of Ebon C. Ingersoll, of Illinois, was heard: "In honor of this immortal and sublime event, I move that the House do now adjourn." The yeas and nays were ordered and the adjournment was carried. As the crowds passed out of the capitol they heard the salute of one hundred guns fired in honor of the great event.

On the day when the general resolution was passed by the House, the President dispatched the Secretary of State to meet three commissioners[2] sent by Jefferson Davis to ascertain upon what terms the war could be terminated. The conference at Hampton Roads, at which President Lincoln himself was present, followed two days later. "No other person was present, except Mr. Seward; no papers were exchanged or produced, and it was, in advance, agreed that the conversation was to be informal and verbal, merely." "On our part," said the President, "the whole substance of the instructions to the Secretary of State was insisted upon." These instructions were, briefly, to make known three indispensable things: the restoration of the national authority throughout all the States; no recession by the President from the position he had assumed on the slavery question in his last annual message to Congress and in preceding documents; and no cessation of hostilities short of the end of the war and the disbanding of all forces hostile to the government.[3]

[1] Journal, H. R., for the day.

[2] Alexander H. Stephens, J. H. Campbell and R. M. T. Hunter.

[3] For the official correspondence, see Richardson's Messages and Papers of the President, VI, 260-269.

The conference, as is well known, ended without result, but the instruction as to slavery was, however, highly significant at this stage of public affairs. The President had no doubts of the adoption of the amendment by Congress, nor of its ultimate ratification by the States. His thought, at this time, was expressed in his brief speech to a body of citizens, who marched in procession to the Executive Mansion on the night following the passage of the resolution, for the purpose of celebrating the event and congratulating the President. "The occasion," said he, "is one of congratulation to the country, and to the whole world. But there is yet a task before us—to go forward and have consummated by the votes of the States that which Congress so nobly began yesterday." He had the honor to inform those present that Illinois had already on that day done the work. Maryland was about half through, but he felt proud that Illinois was a little ahead. He thought this measure was a very fitting, if not an indispensable, adjunct to the winding up of the great difficulty. He wished the reunion of all the States perfected, and so effected as to remove all causes of disturbance in the future; and, to attain this end, it was necessary that the original disturbing cause should, if possible, be rooted out. He thought all would bear him witness that he had never shrunk from doing all that he could to eradicate slavery, by issuing an emancipation proclamation. But that proclamation fell short of what the amendment would be when fully consummated. A question might be raised whether the proclamation was legally valid. It might be urged, that it only aided those that came into our lines, and that it was inoperative as to those who did not give themselves up; or that it would have no effect upon the children of slaves born hereafter; in fact, it would be urged that it did not meet the evil. But this

amendment was a king's cure-all for all evils. It wound the whole thing up. He would repeat that it was the fitting, if not the indispensable adjunct to the consummation of the great game the Nation and the Confederacy were playing. He could not but congratulate all present —himself, the country, and the whole world—upon this great moral victory.[1]

The President signed the joint resolution on the first of February. Somewhat curiously the signing has only one precedent, and that was in spirit and purpose the complete antithesis of the present act. President Buchanan had signed the proposed amendment of 1861.[2] which would make slavery national and perpetual. But many held that the President's signature was not essential to an act of this kind, and, on the fourth of February, Senator Trumbull offered a resolution, which was agreed to three days later, that the approval was not required by the Constitution; that it was contrary to the early decision of the Senate and of the Supreme Court; and that the negative of the President applying only to the ordinary cases of legislation, he had nothing to do with propositions to amend the Constitution.[3] Though thus decided, that the signature of the President to an act of this kind is not required, there was a peculiar fitness in sending the joint resolution to Mr. Lincoln. It may well be believed that he never set his name to a public document with deeper satisfaction. Seldom in the history of a nation have two men, whose character and capacities are in so marked

[1] Lincoln's Works, II, 233-234. Mr. Lincoln's words are closely followed in my text.

[2] See supra.

[3] Globe, February 4, 1865, pp. 588, 629 and 631. The question was settled in 1798. For the decision of the Court see Follingsworth et al. vs. Virginia, 3 Dallas, 381.

contrast, been elevated to such vast power as James Buchanan and Abraham Lincoln. They typify two irreconcilable ideas in human government; ideas fully comprehended in the amendments, to the Constitution, which they signed.

A copy of the amendment is in existence, engrossed on parchment and signed in autograph by the President, the Vice-President and all members of both Houses of Congress who voted for it.[1] The names suggest much of our history. Here are the signatures of two Presidents,—Lincoln and Garfield, and of three Vice-Presidents,—Hamlin, Colfax and Wilson. Here are two who served as Speakers of the House,[2] and twelve who became Cabinet ministers.[3] But of all the one hundred and fifty-eight names on the parchment, none, unless it be Abraham Lincoln's, stand for more, in the long struggle against slavery, than do the names of John P. Hale and George W. Julian. As Free-Soil candidates for President and Vice-President in 1852, these men had gone to the country

[1] It is said to have been engrossed and signed for Mr. Lincoln at his request.

[2] Schuyler Colfax, December 7, 1863-March 3, 1869; James G. Blaine, March 4, 1869-March 3, 1875.

[3] Jacob Collamer, Post-master General under Taylor (1849-1850); Reverdy Johnson, Attorney-General under Taylor (1849-1850); William Pitt Fessenden, Secretary of the Treasury under Lincoln (1864-1865); James Harlan, Secretary of Interior under Johnson (1865-1866); E. B. Washburne, Secretary of State under Grant (1869); George S. Boutwell, Secretary of Treasury under Grant (1869-1873); Zachariah Chandler, Secretary of Interior under Grant (1875-1877); Lot M. Morrill, Secretary of Treasury under Grant (1876-1877); John Sherman, Secretary of Treasury under Hayes (1877-1881), and Secretary of State under McKinley (1896-1897); William Windom, Secretary of Treasury under Garfield (1881); and under Harrison (1889-1891); James G. Blaine, Secretary of State under Garfield (1881), and under Harrison (1889-1892).

on a platform declaring that the government of the United States had no more power to make a slave than to make a king, and that it should at once proceed to relieve itself from responsibility for the existence of slavery; for it possessed constitutional power to legislate for its extinguishment.[1]

If some parchment preserved the signatures of the sixty-two members who voted against the amendment there would be seen the names of men eminent in the counsels of the Democratic party: Thomas A. Hendricks, Vice-President with Mr. Cleveland; George H. Pendleton, candidate for Vice-President with General McClellan in 1864;[2] S. S. Cox, sometime Speaker of the House; Samuel J. Randall, Speaker during seven sessions,[3] and W. S. Holman, a member of the House for thirty years.

[1] Free-Soil Platform, clause 4, Pittsburg, August 11, 1852. McKee's National Platforms of all Political Parties, 1894, 46.

[2] The Platform declared "as the sense of the American people that after four years of failure to restore the Union by the experiment of war, during which under pretense of military necessity or war power higher than the Constitution, the Constitution itself has been disregarded in every particular, and public liberty and private rights alike trodden down and the material prosperity of the country essentially impaired; justice, humanity and liberty and the public welfare demand that immediate efforts be made for a cessation of hostilities with the view to ultimate convention of the States on other possible means to the end that at the earliest possible moment peace may be restored on the basis of federal union of the States." Official Proceedings of the Democratic National Convention, held in 1864, at Chicago; Chicago: Times Steam Book, Job Printing House, 1864, p. 27. Pendleton's nomination (p. 55) was made unanimous. Documentary History II, Washington, 1895, p. 523. In the House of Representatives of Illinois the vote was 48 ayes, 28 nays; in the Senate, 18 ayes, 6 nays.

[3] December 4, 1876—March 3, 1881.

CHAPTER IV.

THE THIRTEENTH AMENDMENT BEFORE THE STATES.

The proposed amendment was now sent to the States, and Illinois ratified it[1] on the day President Lincoln signed. Before February closed seventeen States had ratified,[2] two followed in March,[3] and two in April.[4] Con-

[1] February 1, 1865. The amendment, approved by the President, is given in Statutes at Large, XIII, 567.

[2] The Rhode Island Legislature adopted it by nearly a unanimous vote, the Senate, 28 to 4; the House, 62 to 4; Documentary History, II, 522. The resolution, which was a sign of the times, may be contrasted with the expository resolutions with which some of the Southern States adopted the resolution, "that in the reconstruction of the government of the States lately in rebellion against the Government and authority of the United States, the usual power and legal authority vested in the Federal Government should be executed to secure equal rights without respect to color, to all citizens residing in those States, including the right of the elective franchise. Annual Encyclopedia, 1865, p. 746. Rhode Island ratified February 2. The Michigan Legislature in the session of 1865 passed an act submitting an amendment to the State Constitution to be voted upon at the fall election of 1866, allowing colored men to vote. Michigan ratified February 2. Senate, 21 to 2; House, 56 to 13; Documentary History, II, 525. Maryland, New York and West Virginia ratified February 3; Maryland, 72 to 40. See Laws of Maryland, 1865, pp. 406-407, Documentary History, II, 528; Senate, February 3, 11 ayes, 10 nays; House, February 1, 53 ayes, 24 nays; New York, Senate, 18 to 8; House, 72 to 40; Documentary History II, 533. New York: See the resolution of the Democratic State Convention at Albany, September 6 and 7, 1865, and that of the Republican Convention at Syracuse, September 20, 1865, both favorable to the adoption of the amendment. The platforms of the State Conventions are given in the Tribune Almanac for that year. The ratification of the amendment by West Virginia was unanimous in both Houses. Documentary History, II, 693. Maine and Kansas ratified February 7. Maine, Senate, 31 to 0; House, 98 to 0; Documentary History, II, 701. Maine: See the resolution of the Republi-

can State Convention at Portland, August 10, 1865, demanding equality and uniformity of the right of suffrage by Constitutional amendment, and urging Congress to hold the Southern States under provisional governments until all their inhabitants furnished the State evidence of loyalty and a sincere disposition to secure to all loyal persons in their States equal political rights. See resolutions of the Democratic State Convention at Portland, August 15, to the contrary as to the restoration of the Southern States, and declaring it to be the right of the people of each State to prescribe the qualifications of the electors.

The Kansas House adopted the amendment unanimously. Documentary History, II, 697. Massachusetts and Pennsylvania ratified February 8. Massachusetts, Senate, 40 to 0; House, 204 to 0; Documentary History, II, 735. Pennsylvania Senate, 19 to 12; House, 61 to 33; Documentary History, II, 727.

Governor Andrews of Massachusetts, in his annual message, January 6, 1865, urged the Legislature to request the President to call Congress in extra session, in case the Thirty-Eighth Congress failed to adopt the Thirteenth Amendment. Pennsylvania: Contrast the resolutions of the Union State Convention at Harrisburg, August 18, 1866, with those of the Democratic Convention at Harrisburg on the 24th of August, in their attitude toward the abolition of slavery; and compare the resolutions of the convention of colored men at Philadelphia, July 17, on the question of negro suffrage.

Virginia ratified February 9; Ohio and Missouri, February 10. Virginia, Senate, 5 to 0; House, 9 to 2; Bulletin No. 7, 561; a strong party in Virginia still denies the validity of the acts of the Legislature of 1865.

Ohio, Senate, 20 to 3; House, 58 to 12; Bulletin No. 7, 556.

Missouri, Senate, 25 to 2, 5 not voting; House, 93 to 4, 30 not voting; Documentary History, II, 593.

Ohio: See the resolutions of the Union States' Convention at Columbus, June 23, approving the Amendment, and those of the Democratic Convention at Columbus on the 24th of August, declaring inter alia, "that to each State belongs the right to determine for itself the qualifications of its electors, and the general government cannot nor can any department thereof interfere directly or indirectly with the exercise of this right without palpable violation of the Constitution of the reserved rights of the States; that the effort now being made to confer the right of suffrage upon the negro is an insidious attempt to overthrow popular institutions by bringing the right to vote into disgrace; the negroes are not competent to exercise that right, nor is it nec-

essary to their safety or protection; on the contrary its exercise by them, if attempted, would be fraught with terrible calamity, both to them and to the whites, and we are therefore unequivocally opposed to negro suffrage;" and that "under the rule of abolitionism, and especially under the recent military orders in Kentucky, the emigration of negroes into Ohio is a growing evil, and in order that white labor should be protected against negro labor, and the people against negro pauperism, it is the duty of the Legislature to discourage negro emigration into our State." For an account of the change of political sentiment in Ohio toward free negroes, see my Constitutional History of the American People, 1776-1850, Vol. I, 375-377.

Indiana and Nevada ratified February 16. Indiana, Documentary History, II, 564, Senate, February 10, 1865, 26 ayes, 24 nays; House, February 13, 1865, 56 ayes to 29 nays. The ratification of the amendment by Nevada was by a joint resolution, which was carried in each House by an almost unanimous vote, one in the negative being cast in each branch by a Democratic member. The act of ratification was transmitted to the Secretary of State, at Washington, with the following letter:

Carson City, February 16, 1865.—His Excellency, Abraham Lincoln, President, etc.: Dear Sir—Enclosed I send you a certified copy of resolution passed by our Legislature on the 16th inst., ratifying the Amendment of the National Constitution, abolishing slavery. Truly we live in an age of progress, but this event is an era in our governmental history, and National experience. The prayers of the framers of our fundamental law have entered into the ears of the God of Saboath; He, in dewy smiles has poured wisdom and strength upon our Nation, and the dogma of Free Government, with human bondage as an incident thereof, is forever exploded! "The Lord God, Omnipotent reigneth, let the people rejoice and be glad." I have the honor to be Your Excellency's most obedient and humble servant,

HENRY G. BLAISDEL,
Governor of Nevada.

Bulletin of Bureau of Rolls and Library of the Department of State, No. 7, p. 570.

Louisiana ratified February 17.

The ratification of the Amendment by Louisiana, which was by a vote of 2 to 1 in the Assembly, was accompanied with the resolution, which passed by a vote of 75 to 15, that it was the wish of the Assembly that the power granted to Congress by the second section of the Amendment shall be strictly limited to legislation appropriate and necessary for the prevention of slavery or

involuntary servitude within the United States, but that any attempt by Congress to legislate otherwise upon the political status of civil relations of former slaves within any State, would be a violation of the Constitution. The Amendment was ratified in the House unanimously, 78 votes, and in the Senate by 18 to 1. Documentary History, II, 573.

Minnesota ratified February 23. Documentary History, II, 559. House, February 8, 1865, 33 ayes to 5 nays; Senate, February 23, 1865, 17 ayes to 1 nay. See also Report of Special Committee of the House, February 14, 1865, in its Journal, p. 197.

See the resolution of the Republican convention at St. Paul, September 6, 1865, declaring that the measure of man's political rights should be neither his religion, his birth place, his race, his color nor any mere physical characteristic; also of the Democratic State convention at St. Paul in August, expressing unfeigned satisfaction at the extinction of slavery as an accomplished result of the war.

[3] Wisconsin, March 1, Senate, 26 to 6; one, absent; House, 72 to 16, 12 absent. Documentary History, II, 588. At the Republican State Convention at Madison, September 6, 1865, the minority report of the Committee on Resolutions, one of which advocated the abolition of all discrimination to exercise the right of suffrage on account of color, was laid on the table. Senator Doolittle's majority resolutions were adopted, one of which advocated an amendment to the Constitution, making the number of legally qualified male electors in a State the basis of its representation in Congress. He later proposed it in the Senate as a part of the fourteenth amendment. See infra. At this time the question of extending the right to vote to negroes was a political issue in the State, it was opposed (see resolutions of the Democratic State Convention at Madison, September 20), and was lost at the election, November 7, there being 55,591 votes against it and 46,588 in favor. This popular decision, however, was later overruled by the Supreme Court, which in the case of Gillespie vs. Palmer (1866) decided that the Constitution of 1848, (Article 3, Section 1), though using the word "white" as descriptive of citizens, by including "every male person otherwise qualified," extended the right to vote to persons of color.

Vermont ratified March 9, unanimously in both Houses. Documentary History, II, 597. See resolution of the Democratic State Convention at Burlington, June 26, 1865, declaring that "believing with the immortal Douglas that the government of the country was organized for, and should be controlled by the white race therein, and that the good of all will best be promoted by con-

necticut ratified in May;[1] New Hampshire on the first of July.[2] Amidst these joyous events, Lincoln was assassinated, and Andrew Johnson became President. He sought to carry out Lincoln's policy of reconstruction, and, on the twenty-ninth of May, issued the first of seven

fining the right of suffrage to the white citizens thereof, we are unalterably opposed to conferring the right of suffrage upon the ignorant negroes of the country." Contrast the resolutions of the Republican Convention at Montpelier, June 28, approving the extension of the suffrage to native or naturalized citizens of a quiet and peaceable behavior, irrespective of color or race, and basing this proposition upon the "happy experience of the State." Vermont forbade slavery and recognized the equal rights of men by its Constitutions of 1777, 1786 and 1793.

4 Tennessee ratified April 7. Documentary History, II, 595. Senate, April 5, 1865, 22 ayes, no nays; House, 69 ayes, no nays. See the resolutions of the State Colored Convention, Nashville, August 7, 1865, petitioning for the extension of the suffrage, and protesting against the admission of the Congressional delegates of the State into Congress unless their petition was granted.

Arkansas ratified April 20. This ratification was by a unanimous vote. Documentary History, II, 600.

1 Connecticut: Unanimously in both Houses. Documentary History, II, 602. See the resolution of the Democratic State Convention at Middletown, February 8, 1865, characterizing "the recent so-called amendment to the Constitution of the United States" as "a covert attempt to overthrow and destroy the great Democratic idea of States' rights," and "designated as another step to consolidate power;" an insuperable obstacle for a peaceful adjustment of the difficulties existing between the North and South, and as an eternal barrier to the Union; compare the joint resolution of the General Assembly in May, that "the American people are a Nation and not a confederacy of nations. The States have certain constitutional rights which ought to be preserved inviolate; but as between the Nation and the States, the Nation is sovereign and the States are not. All men within the limits of the United States ought to be absolutely free, and no permanent discrimination in rights and privileges ought to exist between classes of free men."

2 New Hampshire ratified July 1, 1865. Documentary History, II, 604. In the House, 215 ayes, 96 nays; in the Senate, 9 ayes, 3 nays.

proclamations appointing provisional governors in the insurrectionary States. With necessary changes of names and dates, these proclamations were alike,[1] instructing each governor, at the earliest practical period, to call a convention in his State for the purpose of amending its constitution, so as to restore the State to its constitutional relations to the Federal Government. Every delegate and elector should be qualified as required by the law of the State prior to its ordinance of secession, and should subscribe to an oath of amnesty by which he promised faithfully to support the laws and proclamations made during the rebellion with reference to the emancipation of slaves. From the benefits of these proclamations fourteen classes of persons were excepted.[2] This included all who had accepted civil or military services (above the rank of colonel in the army or lieutenant in the navy) under the confederate government or that of the seceding States; all who had left seats in Congress to aid in the rebellion; all persons who had destroyed the commerce of the United States, or who, having taken the oath of amnesty, which Lincoln had prescribed in 1863, had not kept it inviolate.

The first State to convene was Mississippi. Governor

[1] The Proclamations are given in Statutes at Large, XIII, 760-773; also in Messages and Papers of the President's, Richardson, Vol. VI, 314-331. William W. Holden was appointed provisional Governor of North Carolina by the Proclamation of May 29; William L. Sharkey of Mississippi, June 13; James Johnson of Georgia, June 17; Andrew J. Hamilton of Texas, June 17; Lewis E. Parsons of Alabama, June 21; Benjamin F. Perry of South Carolina, June 30; William Marvin of Florida, July 13.

[2] The oath and the exceptions are given in the Proclamation of May 29. This proclamation was prepared by President Lincoln; it was read at the first meeting of the Cabinet, after his death, and was adopted by President Johnson as embodying the policy of his administration.

Sharkey issued his proclamation on the first of July, and the convention assembled at Jackson on the fourteenth of August.[1] The governor, in his message, did not overlook persons who had conscientious scruples about taking the amnesty oath, because they believed the emancipation proclamation unconstitutional. The objection, he said, could not be raised with propriety by those who denied that they were subject to the Constitution of the United States when the proclamation was issued. The question of constitutionality was one to be determined, not by the people, but by the Supreme Court; though legislative bodies often pass unconstitutional acts, they must be re-

1 Journal of the Proceedings and Debates in the Constitutional Convention of the State of Mississippi, August, 1865. By order of the Convention, Jackson, Miss. E. M. Yerger, State Printer, 1865. 296 pages and appendix. This convention was intended to consist of 100 delegates, 98 took the required oath. No election took place in Green County. The members classed themselves as follows: 70 Whigs, consisting of 51 "old-time Whigs," 9 Whigs and Union; 3 Whigs opposed to secession; 2 "co-operation Whigs;" 2 Clay Whigs;" 1 "inveterate Whig;" 1 "steadfast Whig," and 1 Whig and death against the war; of the remainder 9 were not declared, 2 Douglas Democrats, 1 Jackson Democrat, 1 States' rights Democrat, 1 secessionist, 2 Union Democrats, 1 co-operation Democrat, 1 Jeffersonian Democrat; 5 were conservatives, 1 a co-operationist, 1 opposed to universal suffrage, 1 Union and 1 opposed to the war; 35 were lawyers, 38 planters and lawyers, 9 physicians, 6 merchants, 6 ministers, 1 student and 1 banker and clerk of the Court; 21 were natives of Tennessee, 14 of South Carolina, 12 of Virginia, 11 of Mississippi, 10 of North Carolina, 9 of Georgia, 8 of Kentucky, 3 of Alabama, 2 of Pennsylvania, 1 each of Maine, Vermont, Connecticut, New York, District of Columbia and Ireland. Taken from the "Tabular View" of the Convention in this Journal, compiled by Colonel J. L. Power. He was authorized to publish the Proceedings and Debates of the Convention of 1861; see its Journal, p. 83; and also the debate on ratification of the permanent Constitution of the United States, Id. p. 84, Resolution of March 30, 1861. Colonel Power also prepared a Tabular View of the Mississippi Constitutional Convention of 1890; see the Journal of its proceedings, pp. 704-708.

garded as valid and be observed as law until declared void by the proper department of the government. Every presumption was in favor of their validity, as also of the validity of executive acts. The proclamation must therefore be regarded as in force until decided otherwise; when so decided, parties would be absolved from obligation of the oath. But were not those who believed the proclamation void too sanguine in their opinions? The law of nations authorizes one belligerent party to do whatever would strengthen himself and weaken his enemy.

The governor would not say that the principle was broad enough to cover the taking of slaves.[1] The people in the southern States were in rebellion; the President of the United States had a right to prescribe terms of amnesty; he had done so, and the people should cheerfully take the oath and observe it in good faith. "Why should they now hesitate or doubt, since slavery had ceased to be a practical question." It had been the cause of the war, now decided against the South. The negroes were free, practically as well as theoretically,—by the fortunes of war, by proclamation, by common consent. It would be a bad policy now to undertake to change their condition, even if it could be done. It would be nothing less than an effort to establish slavery where it did not exist.[2] Briefly, the governor's advice to the delegates was to submit to the inevitable and to do their best to harmonize all difficulties; for the great purpose of restoring relations with the government of the United States.

It would be expected that a constitutional convention, summoned at a time when the smoke of war had not cleared away, would enroll some members whose hearts were bitter toward the National Government, and who

[1] On this point, see note, p. 72.
[2] Journal, pp. 6-7.

would contribute to restore Federal relations with many mental reservations. There were outspoken Union men in Mississippi at this time, but they were few. The real opinion of many of the delegates was undoubtedly expressed by a member from Wilkinson County while yet a candidate for the convention. To his surprise, he said, he had heard the rumor that he was "an unconditional, immediate emancipationist,—and abolitionist." The rumor was false, and he had been misunderstood, if believed to favor a policy that wronged and would impoverish his country. No man should believe him ready to advocate the abolition of an institution for which he had contended so long, and which he was as fully persuaded as ever was the true status of the negro. Slavery had been abolished by force. The people of Mississippi must accept the situation until they could get control once more of their own State affairs. They could not do otherwise if they would regain their place in the Union, and occupy a position and exert an influence for protecting themselves against further and greater evils which threatened them.[1]

The delegates to this convention were not elected on a strictly defined party issue, "but upon their individual merits as to their character, intelligence and standing in society." Most of the members were of that large class in the South at this time who had yielded submission to the national government under necessity; who realized that the war had made irreversible changes in public and

[1] W. L. Brandon to the voters of Wilkinson County, August 6, 1865; see also speeches of Richard Cooper, a member of the Convention; Hon. Sylvanus Evans, candidate for Congress, and Attorney-General; Vicksburg, September 19, 1865, Id. pp. 63-66; quoted in the Message of the President, December 19, 1865, containing the reports of Carl Schurz and Lieutenant-General Grant. House of Representatives, Executive Document, Thirty-Ninth Congress, first session, p. 101.

private affairs, and who were honestly endeavoring to accommodate themselves to the new order of things. This class consisted of planters, professional men and merchants, past middle life. The second class, more numerous and active, but less influential, were intent on restoring the States to their former position and influence in the Union in order as quickly as possible to get absolute control of their domestic affairs. Of this class the delegate from Wilkinson County was a type. Such men actively supported the reconstruction policy of President Johnson, and clamored for the withdrawal of the Federal troops and the abolition of the Freedmen's Bureau.

A third group consisted chiefly of young men, many of whom had come to their majority during the war, and who were hoping for a time when the Southern Confederacy would achieve its independence. Among them were many loiterers of the towns and idlers of the country, who delighted in persecuting loyal men and negroes whenever they could do so with impunity. Their hatred of the Federal soldiers showed itself in all sorts of petty annoyances. This class did the loud talking; excited the passions and prejudices of the illiterate and unscrupulous, and was immediately responsible for most of the crimes and misdemeanors of these dark days.[1] It was natural that all people of the South who had supported the Confederacy,—and the greater part of the population of Mississippi had supported it,—should have feelings of resentment and aversion at the sight of a Federal soldier.

[1] Id. p. 5. An instance of atrocity committed by two of these "honorable young men" was reported by Colonel John L. Gilchrist, Jackson, Miss., September 17, 1865, Id. p. 69; see list of colored men killed or maimed by white men and treated at Post Hospital, Montgomery, reported by Acting Staff Surgeon J. M. Phipps, August 21, 1865, and at Freedman's Hospital by Assistant Surgeon J. E. Harvey, August 21, 1865, Id. pp. 70-71.

Their attitude toward resident Unionists was quite the same. If the troops were withdrawn, the lives of northern men in Mississippi would not be safe.[1] If garrisons were withdrawn from a county, murders of white Union men and of negroes followed.

A like condition of affairs prevailed in Georgia, Alabama, Louisiana and the Carolinas.[2] The war had destroyed the industrial system of the South. The former slaves were afloat in society; many of them had wild and savage ideas; and most of them had no conception of the civil conditions of which they formed so embarrassing a part. The old feelings of kindness toward the race, which had characterized the South, were suddenly turned into those of fear and hatred. The negroes distrusted their former masters and were rapidly learning to distrust their new protectors and official friends,—the Federal troops. They inclined to distrust anyone who would not acquiesce in their grotesque demands. Trade and commerce in the South being almost at a standstill, there was little demand for labor, and thousands of negroes, accustomed all their lives to care and regular employment, were suddenly thrust upon society with nothing to do, and little disposition to work. That the negro would not work unless compelled to was a common saying of the time. The in-

1 Governor Sharkey to Carl Schurz, Id. p. 8.

2 Id. p. 9. See the report of Brigadier-General T. K. Smith, New Orleans, September 14, 1865, Id. pp. 57-59; of Major-General E. Joseph Osterhaus, Jackson, Miss., August 22, 1865, to General Schurz. Id. pp. 59-61; of General Charles R. Woods, Mobile, Ala., September 9, 1865, Id. pp. 61-62; of Captain W. A. Poillon, Mobile, Ala., September 9, 1865, Id. pp. 72-74; of Major-General J. P. Houston, Selma, Ala., August 22, 1865, Id. pp. 71-72; of Lieutenant-Colonel H. R. Brinkerhoff, Clinton, Miss., July 8, 1865, Id. pp. 75-76; of Captain J. H. Weber, Vicksburg, Miss., September 28, 1865, Id. pp. 77-78; of Governor Sharkey, Jackson, Miss., August 19, 1865, Id. p. 103.

dustrial circumstances were unfortunately exceptional, and a new system of labor had to be created.

Though the slaves were now free, it was the common and freely expressed belief that all the blacks in some way belonged to the whites, and that the negro must be satisfied with what he could get. In many instances, negroes were still kept in slavery, and, in their efforts to escape, were cruelly treated, and sometimes killed. In many districts scarcely a white man could be found who believed that black men had rights which a white man was bound to respect; to kill a negro might be a foolish thing, but not a crime. The heartfelt wish of the white people was to get rid of the whole black population. The freedmen were the objects of unreasonable resentment, based on the notion, that they were the cause of the war and all its calamities.

The attitude of the South to the freedmen was almost identical with its attitude toward free persons of color before the war. Cities and towns became rendezvous of hordes of vagrant negroes, and, in self-defense, enacted regulations even more severe than the old code against free persons of color. The practical purpose of the new acts was to get rid of the negro. He should not be suffered to practice a trade, or to rent a house, or to engage in barter or sale. If by the letter of the law he ventured to trade, or work on his own account, he was subject to an excessive tax wholly beyond his capacity to pay.[1] Indeed, he was not allowed to be occupied in any way except as a laborer hired to an employer. To him he should be bound much as he had been bound to his master in the

[1] See ordinance relative to freedmen in the town of Opelousas, the Parish of St. Landry, and the town of Franklin, Louisiana, July 3, 15 and 28, 1865; and the ordinance of the City of Vicksburg, Miss., August 7, 1865, Id. pp. 92-99.

olden time.[1] There was a clear intention not to allow him to control his own labor. This intention did not always take the form of municipal regulations, but it was the private thought of most of the white people.

Louisiana, in its constitution of 1864, had provided for a system of public schools, open to all the children of the State; but no idea was more odious to most of the whites than that of the education of the negro. "The quickest way to spoil a negro for work is to educate him," was a phrase of the day. Colored schools had already been started under the fostering care of the Freedmen's Bureau and the missionary zeal of venturesome men and women from the North, but they were a target for general attack. If the school house and church escaped burning, it was providential.[2] "If the freedmen are to be educated at public expense, let it be done from the treasury of the United States."[3] The freedmen themselves were in a position so strange and so completely beyond their own comprehension, that they were like men not in their full senses, or awakening from a dream; and it is well to remember that there are good negroes and bad ones. Ages of slavery, and all that it had wrought in the character of the slave, were suddenly abbreviated in these early, tragical days of freedom. The race seemed possessed of the spirit of vagrancy, and terrible consequences followed. The whites complained of the insolence and insubordination of the freedmen and of their wild notions of property and equality. It seemed as if civilization, at

[1] See a summary of municipal regulations, in report cited above, pp. 23-24.

[2] See the report of Lieutenant W. B. Stickney, Shreveport, La., August 26, 1865, and report of Joseph Warren, Id. p. 100.

[3] See letter of Joseph Warren, Chaplain and State Superintendent of Education, to Major-General Carl Schurz, Vicksburg, Miss., September 28, 1865. Messages and Documents above, p. 99.

the South, was to be engulfed in savagery. It was no solution of the civil problem to say to the South at this time, that the ignorance of the negro was not surprising when it had ever been a penal offense to teach him to read. The sense of ownership in the white race is strong, and the idea of property in man, inherited for generations, could not be at once eradicated even by the sword and bayonet.

The race long dominant must itself be educated into a new set of ideas; therefore, in forming an opinion of the work of the reconstruction conventions of 1865, it is necessary and just to weigh fully the civil and industrial ideas, which by inheritance characterized the Southern people at this time. The emancipation of the slaves by the General Government started a great social revolution in the South which time would complete. A counter revolution soon began which is still going on. As yet few men, North or South, could calmly legislate on behalf of the negro. The question for the South was, how to regain its late position in the Union. This, too, was a national question but it involved another: To whom should the work be committed? President Johnson, proceeding, as he believed, in a civil not a military way, would leave the matter of reorganization to the people of each State, requiring only their oath of loyalty to the national government. The first requisite was for the States, in convention, to amend their constitutions, so as to harmonize them with all the acts of the General Government affecting slavery. It would seem, then, that if Mississippi and the other States abolished slavery, they would thereby re-establish the old federal relations. There was no hint at negro suffrage in the President's amnesty proclamation of the twenty-ninth of May; nor was anything said of any particular policy which a State should pursue in seeking to

rebuild its broken fortunes. As far as these States knew, domestic matters were to be henceforth, as formerly, within their own control. Of negro suffrage few men in the South thought, and no man freely spoke. Yet, as Representative Holman of Indiana had said, when opposing the Thirteenth Amendment, it was a principle in the general policy of the Republican party. The possible extension of the suffrage to the negro was becoming alike clear and more ominous.

The condition of affairs, then, in Mississippi at the time of this convention was like that in other States lately in rebellion. The masses of the people were, of necessity, submitting to the conditions imposed on them, but their spirit was unchanged. The negro was no longer slave property, as under the old code, but belonged to all the whites now, as much as formerly he had belonged to his master. The confederate spirit was strong, the national spirit weak,—indeed, almost wholly lacking. The only hope, if the South was to become an integral part of the United States in spirit as it was geographically, was to allow loyal and free labor there to express its will in legislation; therefore, the conclusion of the whole matter was to admit the freed-man into an exercise of political power sufficient to protect himself against oppression, class legislation and private persecution.[1] This was clearly the true policy of the National Government. Would the Southern people co-operate, or would they concentrate their energies upon excluding the negro from political power as well as from industrial freedom?

Though the President had not hinted at negro suffrage in his instructions to the provisional governors, he earnestly desired that it might be adopted. On the second day of the Mississippi convention, he sent a telegram to Gov-

[1] Schurz report, supra, pp. 45-46.

ernor Sharkey,—which recalls President Lincoln's letter to Governor Hahn of Louisiana,—on the extension of suffrage to the negro.[1] He hoped that without delay the convention would amend the State constitution by abolishing slavery, and deny to all future legislatures the power to legislate on the assumption that there can be property in man; also that it would adopt the amendment to the national Constitution now before the States. If it could extend the elective franchise to all persons of color who could read the Constitution of the United States, in English, and write their names, and to all persons of color who owned real estate valued at not less than two hundred and fifty dollars, and paid taxes it would completely disarm the disloyal faction and set an example that other States would follow. This it could do with perfect safety and thus place the southern States in reference to free persons of color upon the same basis as the free States. He hoped and trusted that the convention would do this, and as a consequence the radicals, who were solid for negro franchise, would be completely foiled in their attempt, by not accepting their Senators and representatives,[2] to keep the southern States from renewing their relations to the Union.

At this time, free persons of color in the State of New York, three years a citizen and paying taxes on land of the value of two hundred and fifty dollars, clear of encumbrance, were entitled to vote.[3] But New York had twice

[1] See page 86.

[2] Andrew Johnson to Governor Sharkey, August 15, 1865. Senate Executive Document No. 26, Thirty-Ninth Congress, first session, p. 229; compare with Lincoln's letter to Governor Hahn, supra, p. 86.

[3] New York Constitution of 1846; Article 2, Section 1. The question of equal suffrage to colored persons was submitted to vote in 1846 in New York, and was rejected by a vote of 223,834

refused to give equal suffrage to the negro. Was the President justified in hoping that Mississippi would extend the suffrage to him, unless under compulsion?

An amendment was soon reported, abolishing slavery and instructing the legislature to protect the persons and property of freedmen, and to guard them and the State against any evils which might arise from their sudden emancipation.[1] The ordinance of secession should be declared null and void, as also all other acts identifying the State with the Southern Confederacy.[2] But all laws, judicial decisions and administrative acts since the ninth of January, 1861, not violative of the Constitution of the United States or of Mississippi, should be binding to all intents and purposes.[3] The phrase "null and void" in the ordinance repudiating secession, displeased many who preferred the term "abrogated,"[4] and the difference precipitated a long discussion. An amendment abolishing slavery, in the language of the ordinance of 1787, or of the Thirteenth Amendment now before the States, did not please many members. Ought not the amendment to have a preamble saying that slavery, having been abolished in Mississippi by the action of the Government of the United States, was therefore abolished; and then use the language of the great ordinance? But did a preamble, in this form, state the truth? Had not the Southern States, by seceding, caused the abolition of slavery? Was it right to attribute it solely to the General Government?[5]

to 85,306; again submitted in 1860, and rejected by a vote of 337,984 to 197,503, and again submitted in 1868, and rejected by a vote of 282,403 to 249,802. Hough's American Constitution, Vol. II, 66-67.

1 Journal, August 17, 30.

2 Journal, 34-36.

3 Id. pp. 36-37.

4 Id., 38

5 Journal, 45.

Yet every member knew that the Federal Government had asked him to take the oath to support the acts of Congress and the proclamations of the President, as to emancipation, and it was by these that slavery had been abolished.[1] Was it not better to act in the spirit of this oath, when explaining the means by which the institution was abolished? If it were true that the General Government had abolished slavery, ought it not to make compensation for the slaves it had emancipated?[2] The President's proclamation indicated that, notwithstanding the acts of secession and of war, Mississippi was still a State of the Union. No conditions unauthorized by the national Constitution should be imposed upon her, as to the admission of her Senators and Representatives to Congress.[3] The general government had no authority to impose special test oaths of loyalty upon her people, or her representatives; and, if the intentions of the President were correctly understood, he was willing to admit the Mississippi delegation with the State constitution just as it stood. Had he not said recently, in an interview with a delegation from South Carolina, that he would advise making slavery "legally and constitutionally dead" and that this was the conditions of restoration to Federal relations?[4] Evidently all that need be done was to adopt a free State constitution, and ratify the proposed Thirteenth Amendment.[5]

The President had not advised the people of Mississippi in any official form; but his reported opinions strongly hinted at this procedure.[6] True, there was a party at

1 Id., 47.
2 Id., 55.
3 Id., 56.
4 National Intelligencer, June 27, 1865.
5 Journal, 58.
6 Id., 59.

the North, and strong in Congress, who would insist upon imposing illegal restrictions upon the State. One of these was immediately by State action to raise the late slave population to the position and dignity of equals with the whites. Here lay the danger. The State, by adopting an abolition amendment for the purpose of securing admission to its delegates to Congress, must not yield too much; otherwise, further aggression would be invited. Undoubtedly, if the State establish a perfect equality between the two races, its delegation would be received; but no conservative man would approve such a course.[1] To advocate negro equality was political suicide for the white men of the State. If the party in power imposed the condition of free suffrage, it could not be avoided.[2] If the adoption of a free State constitution was to lead to the removal of United States troops from the State, why had not those been removed from Tennessee, in which slavery had been abolished over a year? Evidently, the military would not cease to interfere in the domestic affairs of the State until its courts recognized that the black man had the rights of the white.[3] But was this the true policy of the State? Was it not enough if it passed all laws and regulations to secure the negroes protection and justice, to regulate their labor, and to prevent idleness, pauperism and crime among them?[4] It would be well to remember that the admission of the negro to equality with the white man would have a disastrous effect upon the request for compensation for slaves. The mass of the population of the State were innocent parties in the late war, and, in many instances the owners of slave property were helpless women and orphans. They had not been implicated in the rebellion. No argument could be raised to relieve

1 Id., 61.
2 Journal, 62.
3 Id., 63.
4 Id., 67.

the Federal Government from making compensation to this class; but, if an abolition ordinance was adopted, who could not see that Congress would respond to the appeals for compensation by saying, "Whatever may have been the legal effect of the proclamations and laws of Congress regarding emancipation, one thing is sure—the State of Mississippi has adopted a valid ordinance abolishing slavery; and, whether or not these slaves were freed by an act of Congress, or by Presidential proclamation, they are freed by a sovereign State. We will not stop to discuss the question, but say to the petitioners, 'Go back to your State, look to your State constitution, and apply to the authorities for such compensation as they may deem proper.' "[1]

The whole conduct of the General Government toward slaves had been as toward property. Had not President Lincoln, in his preliminary Emancipation Proclamation, urged upon Congress the duty of making compensation to loyal men in the South, for property lost by reason of the war? Had not the Government, in abolishing slavery in the District of Columbia, awarded compensation to the owners? And had not both Houses of Congress, during the war, declared it the duty of the Government whenever any State adopted a policy of gradual emancipation, to give pecuniary aid?[2] Clearly it was the duty of the United States to compensate slave-owners in Mississippi. Let it say to the people of the State, that it would relieve them from taxation for a series of years. It would be a present relief and ten thousand-fold more effective than it could have been in 1862. A mere pittance of what was righteously due, on account of emancipation, would be very much to an impoverished people.[3]

[1] Journal, 68.
[2] Id., 69.
[3] Journal, 70.

In adopting an abolition amendment to the constitution it would be well to make it, and all legislation based upon it, inoperative, until the Representatives and Senators of the State should have been admitted to their seats in Congress.[1] Their admission should be duly declared by the governor, but should not be construed to prejudice any right of compensation by the United States for the loss of slaves. Mississippi, it should be remembered, was a State, not a Territory. The convention was exercising a sovereign authority. What right had the President or the provisional governor to determine what the State should do? Would they hold it in duress, and extort a policy from its people, by force and organic law, which neither they nor the Constitution of the United States required? Surely, the President did not get authority from the Constitution to call a convention of the people of any State. He claimed to speak only as an advisor. The convention recognized no overseer or dictator.[2] Therefore, simply repeal the old provision in the State constitution prohibiting the introduction of slaves and emancipation;[3] this would accomplish all that was necessary to comply with the advice of the President.[4]

Had not President Lincoln, in his first inaugural, declared that he neither had the intention nor the power to abolish slavery? That the United States had no such power, Mr. Seward had since assured the French government. Though slavery in the State was abolished in fact, it was not abolished in law; slaves were not surrendered with the Confederate army. So far as negroes were actually captured and held by that army, they, and no others,

1 Id., 71.
2 Id., 73.
3 Mississippi Constitution, 1832, Article VII, Section 1, "Slaves."
4 Journal, 74.

were freed by the laws of war. If this were not so, there was no longer a government of the people.[1] The fate of States that had abolished the institution should be remembered. In Maryland and Tennessee,—and both had abolished slavery,—Federal troops were more numerous than in Mississippi. Let the State make the concession, but make its effect and operation dependent upon the conduct of Congress: that it admit the Representatives of the State to their seats. The condition should not be interpreted as dictation or as a threat, but as an extraordinary concession,—a sacrifice to attest devotion to the Union, in thus parting forever with all the labor and wealth of generations.

Many feared that the State would not enjoy its rights and privileges until it ratified the Thirteenth Amendment, conferred upon Congress the right to legislate for the negro, and itself enfranchised him. The Mississippi Senators and Congressmen ought not to be required to take any oath other than that prescribed by the Constitution of the United States. The President's amnesty oath of the twenty-ninth of May, if strictly applied, would exclude nearly every man in the State; for who was there who did not sympathize with the Confederacy? Throw upon Massachusetts, Maine and New England the final responsibility for the operation of the Thirteenth Amendment.[2] Mississippi had never been out of the Union;[3] there was no such thing as reunion or reconstruction. The ordinance of secession was a nullity, and did not put the State out of the Union. Its people had failed to fight themselves out of the Union, and the federal government had no legal power to expel the State from the Union.

1 Id., 75.

2 Journal, 78.

3 Compare the decision in Texas vs. White (1868), 7 Wallace, 700.

Had not President Lincoln, at all times, held that the State was in the Union and refused to receive or to treat with Confederate commissioners, on the sole ground that secession was a nullity? Was not his whole policy one toward States in the Union, though in rebellion against the authority of the general government? Had not Mississippi, in her sovereign convention of 1851, declared that the State had no right to secede from the United States?[1] The present convention would declare secession a nullity. Its members could not vote her any further in, nor vote her out. Her civil rights and authority were superseded, for the present, by military power and force, in order, it was said, to purge her people of their treason, and to fit and prepare them for loyal subjects; and none of the multiplied questions about the negroes were settled. Those who had subscribed to the amnesty oath, as the late election proved, constituted a majority, and the power of the State. They had taken the oath in good faith, with a determination to cast no obstacle in the way of harmony and the restoration of all civil rights. By the action of her people in taking the amnesty oath, the State stood redeemed, and was entitled to an equal station with any State in the Union.[2] Every lawyer, who remem-

[1] Journal of the Convention of the State of Mississippi and the act calling the same, with the Constitution of the United States and Washington's Farewell Address, published by order of the Convention, Jackson; Thomas Palmer, Convention Printer, 1851, 79. "Resolved, That in the opinion of this Convention, the assertion of secession from the Union on the part of a State or States, is utterly unsanctioned by the Federal Constitution, which was framed to establish and not to destroy the union of the States, and that no secession can, in fact, take place without the subversion of the Union established, and which will not virtually amount in its effect and consequences to a civil revolution," 47-48.

[2] Journal, 81-82.

bered his Blackstone, knew that there are four great relations in life; those of husband and wife; parent and child; guardian and ward; and master and servant.

The Federal Government had no more power to interfere between master and servant, until the relation was legally and constitutionally dissolved, than between husband and wife, or parent and child. The relation was a private one, regulated by the State. If not, then these fundamental relations in society might be invaded and hopelessly destroyed at any time, at the pleasure of the federal government. Its military arm was in subordination to the civil authority, and this in turn to the Constitution and the laws. When the British government, in 1776, offered freedom to the slaves of New England and the South, provided they would join the British army and fight the rebels of that day,—our fathers,—and burn their homes, there was universal indignation from New Hampshire to Georgia, and yet the present case was parallel.[1] There was nothing in the constitution of the State creating or perpetuating slavery; the institution was no longer approved. There could be no conflict with the general government in the matter, and this would leave the people of the State at liberty to revise the final action of the federal government in the Supreme Court.[2] But this version of a story, which is yet in the telling, was not accepted by the members.

Mississippi had been vanquished and was without power

[1] Journal, 84. Perhaps it is not fully appreciated even yet what the people of the South understood when they said that the war was, on their part, "for Southern independence." The parallelism which was drawn between the Revolutionary and Civil Wars, in the declaration of rights issued by South Carolina, of which an account has already been given (see Vol. II.) runs all through the Southern discussions and the literature of the period.

[2] Journal, 85.

to choose her own course, and the powers at Washington made but one course possible: the adoption of a free constitution. If the State would resume its former position, with all its rights and privileges unimpaired, it must conform to that dictation; if it refused, it must suffer long and lingering years of misery in the stern, inexorable control of military rule; it must submit to be garrisoned by negro troops. The object for which the convention had met must not be forgotten. Whatever the sacrifice, let the State pursue almost any course that would restore civil rule, secure representation in Congress and banish every vestige of military power.[1] The right of secession never did exist in the Federal Constitution, and ought never to have been exercised, but why thresh again the stale straw of the right of secession. If the State refused to follow its opportunity and the suggestions of the President, it would discourage the great conservative party of the North and West, which was coming up in aid of its radicals, and place in their hands a weapon with which they were successfully carrying out their future doctrine of negro equality and negro suffrage. So sure as the State failed to obtain representation in Congress, so sure would the radicals pass and rivet upon its people the disgusting doctrine of negro suffrage, which would indeed render this country no longer an abiding place for white men.[2] From that party in the North called the "Copperheads," and even from the ranks of black Republicans, there were springing up many conservative patriots armed for the coming struggle.[3]

[1] Journal, 88.

[2] Journal, 89.

[3] Id., 90. The doctrines of the "Copperheads," in their purity, may be read in the books and pamphlets sent forth from the "Democratic Publication House, Von Evrie, Horton and Co., 162 Nassau St., N. Y.," 1861-1867.

Governor Sharkey had not communicated to the convention the President's suggestion on negro suffrage. The President, it was repeatedly said in the convention, was committed emphatically against the doctrine of negro suffrage; every member of his Cabinet, save one, was thought to be with him on that great question.[1] If the South could get back speedily into the Union, said a member, all the revolted States with their Representatives united with the President and those members of his Cabinet friendly to his doctrine and leagued with the great conservative party of the North, would at once form a great party irresistible in its power, and sufficiently efficacious and strong to control the next Presidential election to defeat the radicals, and to place some conservative northern man in the chair. It would not advantage a southern man to gain it, and the South should be well satisfied with a northern man of conservative sentiments willing to accord the revolted States their political rights and privileges. But if the State began making conditions, the northern radicals would say: Look at the people who have been in rebellion against the constituted power of the government; they have not even yet subdued their rebellious spirit, and are talking about having their rights guaranteed as a condition precedent. They are talking about the right of compensation for slaves and manifesting a spirit which cannot be trusted. Their Representatives cannot be admitted to Congress while that spirit exists; keep the bayonet over them, and let the tramp of soldiers be heard by day and by night; maintain a garrison in every town and village, and hold them until that spirit is quelled.[2] If the convention adopted such a proposition it would prove a death blow to the State.

1 Id., 90.
2 Journal, 90.

As to compensation for slaves, two reasons ought to satisfy everybody. The people, who for half a century were the implacable enemies of the institution, and who finally destroyed it, would never consent, if in power "to give up one picayune of the public treasury to compensate a single individual;" and secondly, if others were willing, they were so bankrupt that the "attempt would hopelessly involve the General Government in pecuniary embarrassment."[1] Every condition that weighed down the amendment by which the State hoped to recover its place in the Union, would be construed by Congress as evidence of the spirit of rebellion.[2] Therefore nothing should be done to clog its admission to Congress. Let the institution of slavery and the question of compensation go; let everything go until the men of the South had relieved themselves and their posterity from the present position, and obtained some little guarantee at least that the children whom they were rearing up would have a land to live in, and the privileges of free men.[3]

The ordinance of secession, said another member, was either constitutionally operative and obligatory upon the citizens of the State, or unconstitutional, null and void. If the former, the State had ceased to be an integral part of the Union, and as the ordinance was still unrepealed, Mississippi continued to sustain to the United States the relation of a foreign power. On this hypothesis, the convention was now endeavoring to effect a readmission of the State into the Federal Government. Did it not belong to the convention, then, to dictate the terms, or was it the right of the United States to prescribe them? Right or wrong, the General Government had power to prescribe the

1 Id., 92.
2 Journal, 94.
3 Id., 95.

terms, and, looking to passing events, it would exercise it. Conceding that the ordinance of secession was unconstitutional, was it not clear that the people of the State had forfeited their rights as citizens of the United States?[1] Slavery having been abolished, the effect of the action of the convention, whether it adopted the language of the ordinance of 1787 simply, or made its adoption a matter of subsequent legislation, was inoperative until Congress should admit the State to representation.

Even the appearance of any wish to dictate terms on which the State would consent to what was already an accomplished fact should be avoided. The true policy between the two governments was one of mutual confidence.[2] Whether or not Mississippi had the right to declare itself an alien to the Government of the United States was for the United States to decide, but that she did it was a fact; so far as individual citizens were concerned, they were lost in the responsibility which the State assumed. The resistance which the southern people made to coercion had been so formidable they compelled the United States to recognize them as belligerents, by the cartel, by the exchange of prisoners, and by the flag of truce. "Resistance," continued a member, "assumed a dignity above treason. It was a revolution, and must be, and was so regarded by the civilized nations of the world."[3]

But there were other reasons why the abolition of slavery should be made without condition. A condition would amount to a bargain with the abolitionists of the North,—those opposed to the rights of the South. It would be equivalent to saying to that party: You desire to place the freed-men of the country, the negroes or mulattoes,

[1] Journal, 97-98.
[2] Id., 102.
[3] Id., 108.

upon an assured civil and political equality with the white men; you have secured their freedom, and now ask that they shall be made an equal. We will agree with you to free them on the condition that you will, on your part, agree that our Representatives be admitted into Congress. The slavery question was settled, but there remained a living and unsettled issue,—the future status of the free negro. The great question was, Who should have jurisdiction over him: the Federal Congress or the people of Mississippi? How should the State secure it? Certainly not by encumbering the abolition amendment with useless conditions. Act boldly and manfully as practical men, and without a doubt the State in the end would secure all it desired. Give the freedmen the right of personal security, of personal liberty and of property, but go no further.[1]

At the South this indeed was the living issue, whose consequences were feared. If the doctrine was true, that Mississippi by secession had forfeited all her rights, then she could claim nothing as part of the federal Union, and so long as she remained in this condition, the Government of the United States might rightfully deal with the suffrage and with other questions. But the people of Mississippi should be exceedingly circumspect lest they admitted this proposition to be true. Who believed the State would ever consent that the Federal Government should regulate the right of suffrage, and by making the negroes the sole voters in the State reduce the whites to the condition of their former slaves?[2]

But if the convention proclaimed to the world that the State and people, having forfeited all rights, had none,—how could they object to the demands of the advocates of

1 Journal, 109-110.
2 Journal, 129.

black suffrage, or oppose any of their schemes?[1] The people of the State should do nothing to embarrass their friends at the North, nor the administration at Washington. Was it true that slavery in Mississippi was not merely dead but "killed four times over;" by the proclamation; by acts of Congress; by the might of the sword; by the opinion of the Christian world? President Lincoln had never attempted to declare the institution of slavery abolished in Mississippi, nor to overthrow the fundamental law on which it rested. He was not dealing with the institution and the laws made in support of it, but with individual slaves. Every individual held as a slave in the State on the third of January, 1863, might have been removed by the laws, or ordinances, declaring them free, but slavery as an institution would not have been abolished. The President's proclamation excepted from its operation some parishes in Louisiana, some counties in Virginia, and the whole of West Virginia and Kentucky. "Notwithstanding the Proclamation," said a member, "I have a full legal right to go to Kentucky, there buy slaves as property and bring them here, and hold them as slaves in Mississippi.[2] Abolition of the institution of slavery could be made only by a sovereign State."

The Thirteenth Amendment lately proposed in Congress, and already agreed to by a large number of States,[3] might be soon engrafted into the Constitution. The first section abolished slavery throughout the Union. The second conferred extra powers upon Congress, but the two sections gave almost unlimited powers, and at a time when, throughout the country, constitutional restrictions were not regarded as they once were. "I fear excessively,"

1 Id., 130.
2 Journal, 133.
3 By twenty-three, at this time.

said a member, "that there is hidden away in that last section something that may be destructive to the South. I am not willing to trust men who know nothing of slavery with power to frame a code for the freed-men of Mississippi. I am not willing to trust these men, who have been educated from youth, taught in their schools, from the pulpit, by their public speakers and by their writers, that the white population of the South is a degraded race as compared with our more favored brethren who live in a northern clime; who have been taught also that slavery is odious, that the master is not restrained by feelings of humanity, that it is only interest that guards him in his conduct toward the slave; who, by exciting books, periodicals and speeches, have been led to look upon us as a race of monsters, and by whom the negro, in his ignorance and vice, has assumed a being far superior to what we know him to be." The North painted the good qualities of the negro as its most popular novelist had painted those of the Indian.

But now, exasperated with the South on account of its resistance to Federal authority; hating its people and their peculiar institution, their customs and even their manners, disregarding their rights, who would be willing to trust to the fanatics of the North to form a code that should govern the freedmen of the State of Mississippi? Would it not make residence in the State impossible for a white man?[1] Congress would thus have power to fix the political status of the freedmen, to put them on an equality with the whites by giving them the right to vote and to control the State. Might not the time come when it would no longer be a question with the whites of Mississippi whether they could remain in the State? It was possible that, at the coming session of Congress, an amendment to

[1] Journal, 137-138.

the Constitution might be proposed giving to Congress the power to regulate the political condition of the negro. The State was willing to abolish slavery, but it should be allowed to fix the moment when emancipation should take place. Congress had no right to demand more than a free State constitution. Every day public affairs in the South were growing worse. Its people were more directly interested in the negro question than those of the North; though these were disposed to take the settlement of the question into their own hands.[1]

Meanwhile other Gulf States were taking action. Alabama and South Carolina convened in September;[2] North Carolina, Georgia and Florida in October;[3] Texas de-

[1] Journal, 138-139.

[2] Journal of the Proceedings of the Convention of the State of Alabama, held in the city of Montgomery, on Tuesday, September 12-28, 1865; Benjamin Fitzpatrick, President of the convention; William H. Osborne, Secretary of the convention; W. W. Screws, Assistant Secretary of the convention, Montgomery; Gibson & Whitfield, State Printers, 1865; 80 pages.

Journal of the Convention of the People of South Carolina, held in Columbus, South Carolina (September 13-27), 1865, together with the Ordinances, Reports, Resolutions, etc. Published by Order of the Convention, Columbus, South Carolina; J. A. Selby, Printer to the Convention, 1865; 216 pages.

[3] Journal of the Convention of the State of North Carolina at its Session of 1865 (October 2-19), 94 pages; 111, Raleigh; Cannon & Holden, Printers to the Convention, 1865: or Executive Documents, Convention and Sessions, 1865; Constitution of North Carolina with Amendments, Ordinances and Resolutions passed by the Convention, Session 1865; Raleigh; Cannon & Holden, Printers to the State, 1865. Message of Provisional Governor Holden to the Convention, 3 pp. Report of Public Treasurer to the Convention, 108-111 pp. Report of Superintendent of Insane Asylum, 12 pp. Report of Superintendent of Deaf and Dumb and Blind Asylum, 8 pp. Constitution of the State of North Carolina with Amendments, 38 pp. Ordinances and Resolutions passed by the Convention, Session 1865; 40 pp. Journal of the Proceedings of the Convention of the People of Georgia, held in Milledgeville,

layed until February.[1] The utterances of the Mississippi convention expressed the opinions of the people of all the Gulf States. Governor Parsons, in his message to the Alabama convention, declared the slave code a dead letter, and that there were no more slaves in the State.

It was clear from the message of the President and his advisory words to the various delegations from the southern States, that he intended to treat them with clemency, yet each State was looked upon and treated as still in insurrection, and subject to military law, and this condition of things was certain to continue so long as any State refused the proposition which the President had made that it should adapt its organic law to existing facts; it was therefore idle to discuss the conditions of submission. Though the institution of slavery was abolished by ceasing to exist, the laborers were still upon the soil; and, by just legislation and fair dealing, they might be so directed as to enable the people of the South to regain a great degree of their former prosperity. The white man owned the land; the negro owned the labor; and such an

in October and November, 1865 (October 25-November 8), together with the Ordinances and Resolutions adopted; Published by Order of the Convention; Milledgeville, Georgia; R. M. Orme and Son, Printers for the Convention, 1865; 269 pp.

Executive Document No. 26, Senate, 39th Congress, First Session, pp. 202-218. The Convention assembled at Tallahassee October 25th, and adjourned November 8, 1865. Id., pp. 203-207.

1 Journal of the Texas State Convention, assembled at Austin, February 7, 1866, adjourned April 2, 1866, Austin; Printed at the Southern Intelligencer Office, 1866, 391 pp. The Constitution as Amended and Ordinances of the convention of 1866, together with the proclamation of the Governor declaring the ratification of the amendment to the Constitution and the General Laws of the regular session of the 11th Legislature of the State of Texas; by Anthony Austin; Printed at the Gazette Office by John Walker, State Printer, 1866, 272 pp. Index xxvii, p. 272.

arrangement might be made as would compensate the one for his work; the other for the use of the land.

In 1859 slave labor had brought forty-five million dollars to Mississippi, for its cotton crop; though the product of that year, one million three hundred thousand bales, might not again be repeated; yet the diminution of the product would increase its value; and if the State raised only three hundred thousand bales, it could now realize sixty millions of dollars for them. The poor white, who had raised his cotton with his own hands, and had realized, perhaps, one hundred dollars for his toil, could now receive five times as much. Of all industrial systems, that of slave labor, as experience proved, was the most costly. The slaveowner could not cultivate his land unless he owned, or actually bought for life, the labor necessary for its operation. Every laborer cost from one thousand to fifteen hundred dollars, the interest on which sum was no less than ten per cent a year. He had to feed and clothe the slave, to supply him with medicine and to lose his time in sickness. If the slave died the owner lost his value in actual capital. He was, in fact, an insurer of the slave's life and health. Henceforth every man who had land to cultivate could go into the market, and for an annual hire cultivate it without this expensive insurance. He would simply pay for the use of the labor during the year. The surplus he would use, not in buying hands, but to invest in real estate, in banks and in internal improvements. It was precisely this which had enabled the North to make its vast material progress.[1]

Those who would demand compensation for slaves as a condition of abolition, should remember that there was but one course to follow; no man could sue the United

[1] See almost the same statement in the debates in the Federal Convention: Ante, Vol. I, pp. 536-539

States in any court. If loyal, all that he could do, with any claim against the government, would be to petition Congress to allow it, or to bring it before the Court of Claims. If adjudicated in his favor, he could then ask Congress for an apportionment; and this it might refuse or not, as it pleased.[1]

The war had produced many evils, but the state of things was not without some compensation. Beyond all question, the war had demonstrated that in a military point of view, and as a political institution, slavery is a source of positive weakness. When the southern States were invaded by an army, proclaiming freedom to the slaves, it obtained positive power with which to enforce the declaration and continue the war. "This fact," said a member,[2] "was recognized by the Congress of the Confederate States, which at its last session was prepared to declare, and probably did pass laws declaring, the emancipation of slaves upon condition of service in the army."

The reference was to the bill passed by the Confederate Congress on the seventh of March, 1865,—about three weeks before the fall of Richmond,—which authorized Mr. Davis to receive into the military service such able-bodied slaves as might be patriotically tendered by their masters, to be employed in whatever capacity he might direct; but the bill made no change in the relation of master and slave. The result of the act was the organization of two negro companies in Richmond, composed, it was said, chiefly of vagabonds, who were allowed to give balls at Libby Prison, and were exhibited in fine, fresh

1 Journal, 158.

2 J. S. Yerger, of Jackson, who had been a member of the Secession Convention of 1861, and who was one of the Commissioners of Mississippi who took counsel with President Johnson as to the best method of reorganizing a State government. See Journal, p. 145, and the last page of "Tabular View."

uniforms on the streets, as decoys to obtain other recruits. The act was evidence of the desperate straits of the Confederacy, and was generally considered, by the few who heard of it, as a surrender of the South to the whole theory of abolitionism, and a confession to the whole world that secession and the organization of the Southern Confederacy were unjustifiable.[1] "It was a declaration," continued the member,[2] "that in the opinion of the Confederate Congress, there was one thing better than slavery,—the independence of the southern States."[3]

But there was another and a very favorable compensation for abolition. Formerly the State was permitted representation on the floor of Congress for only three-fifths of its population; henceforth, it would be increased by fifteen to twenty additional members.

It was evident that the amendment abolishing slavery would be adopted; the question was, simply, whether or not to load it down with conditions. On the twenty-first of August the vote was taken, and the amendment adopted declared that slavery in the State was destroyed. It was made the duty of the legislature to provide for the protection of the freed-men, and to guard the State from

[1] For an account of the bill, its opponents and defenders, see Edward A. Pollard's Life of Jefferson Davis, with a Secret History of the Southern Confederacy (1869), pp. 447-457. On the 17th of February, 1864, the Confederate Congress passed an act to increase the efficiency of the army, by the employment of free negroes and slaves in certain capacities. Free negroes were dcelared liable to duty in action with the military defence, and were to receive rations, clothing and $11 a month. Male negro slaves not to exceed 20,000 might be employed in a similar manner; the owners to receive such wages as might be agreed upon with the Secretary of War. He could resort to impressment, if necessary. Public Laws of the Confederate States of America, passed at the 4th Session of the First Congress, 1863-4. Richmond, 1864, p. 235.

[2] Mr. Yerger.

[3] Journal, p. 157.

evils that might arise from their sudden emancipation.[1]

The next question was whether the ordinance of secession should be declared "null and void,"[2] or, "repealed and abrogated."[3] A long discussion followed, and several ordinances, varying in language, were submitted. Could the act of a sovereign convention, such as that of 1861, ever be repealed, abrogated and declared null and void? Would not a vote to repeal stultify the political life and principles of the members?[4] Did not all believe in the right of revolution? Did the ordinance of secession rest upon no other principle? In the same hall in which the convention was now assembled, men equal to the members now present,—and seven of these were among them,[5] —had, in 1861, asserted the right of revolution.[6] If the ordinances of secession were now declared a nullity, from what time would the nullity begin?

The answer to these questions involved the legality of the administration of the government of the State for the last five years. After all, was not a repeal of the ordinance superfluous? Was the act of secession in exactly the same condition as slavery?[7] The convention might find itself in a dilemma. If it did not repeal the ordinance, would it be possible to resume federal relations? If it declared the ordinance null and void, would it not thereby declare an interregnum in the government of the State since 1860? The way to avoid the difficulty would be to declare the laws and ordinances since 1860 to be of "no further force or effect." Whether the State had been

1 The amendment passed by a vote of 87 to 11 (Journal, 165).
2 Journal, 33.
3 Journal, 17
4 Journal, 185.
5 Six of them had voted against the ordinance of secession.
6 January 9, 1861. Convention Journal (January), p. 16.
7 Journal, 192-195.

in rebellion or in revolution, the war was at an end; nothing was to be gained by distinctions in mere abstractions. Do by the secession ordinance as had been done with slavery,—act according to the facts. This would comply with the President's advice, and enable the State to resume its place in the Union. This opinion prevailed, and the ordinance of secession, passed by the State on the ninth of January, 1861, was declared "null and void."[1]

Governor Sharkey telegraphed the action of the convention to the President, who responded that he thought it would have a decided influence upon the public mind, and be an example to the other Southern States. The troops, who were the cause of so much irritation, would be withdrawn at the earliest practicable period.[2] The convention, though it abolished slavery in the State, took no action on the proposed Thirteenth Amendment. While it was in session, the President telegraphed to the provisional governor that it could adopt the amendment itself or recommend its adoption by the legislature.[3] September and October passed and the legislature took no action. On the first of November, the President expressed his fears to the governor, that the failure of the legislature to ratify the amendment would create the belief that the act of the convention in abolishing slavery would later be revoked by the legislature. "If the convention abolished slavery in good faith, why should the legislature hesitate to make it a part of the Constitution of the United States?"[4]

[1] By a vote of 81 to 14; August 22d. Journal, 221.

[2] President Johnson to Governor Sharkey, August 25, 1865. Senate Executive Document, No. 26, 39th Congress, First Session, p. 231.

[3] The President to Governor Sharkey, August 21, 1865. Id., p. 230.

[4] The President to Governor Sharkey (telegram), November 1, 1865. Id., 233.

More than a month passed and the legislature then took action. It was in the form of a report from the joint Committee on State and Federal Relations. The first part of the proposed amendment, so the committee reported, had already been adopted by the convention. The condition of the negro was therefore fixed by a sovereign act, and the freedmen could not, by subsequent constitutional amendments, be again enslaved. The Federal Constitution and the laws of Congress prohibited the slave-trade, so that it would be impossible to re-establish slavery in Mississippi or elsewhere in the South. As the convention had adopted these in good faith, the adoption of the proposed Thirteenth Amendment could have no practical operation in the State of Mississippi.

The second section of the proposed amendment was subject to more grave objections; it conferred on Congress the power to enforce the article "by appropriate legislation." Slavery having been already abolished, there was no necessity for the section, nor could any possible good result from its adoption; on the contrary, it seemed fraught with evils, which the legislature and the people of the State were most anxious to guard against. Slavery might be regarded as extinct everywhere in the United States. It had legal existence nowhere, except in Kentucky and Delaware; it was there tottering to its fall, and must soon cease. Whatever the sentiments and preferences of those States, it was quite certain that liberation prevailed everywhere else and slavery could not be perpetuated in them. The proposed amendment was not needed, then, to coerce Kentucky and Delaware into emancipation. The people of Mississippi were anxious to withdraw the negro race from national and State politics and as far as possible to forestall and prevent the outbreak of agitation.

No one could tell what construction a future Congress might put on this section. It might be claimed that it would be appropriate for Congress to legislate respecting freedmen in Mississippi. No more dangerous grant of power could be conceived than one which by construction might permit Federal legislation respecting persons, denizens and inhabitants of a State. Even if there was no present danger, the time might come when the public mind might be influenced on this subject to a degree dangerous to the reserved rights of the States. It was not an appropriate time to enlarge the powers of the Federal Government. The tendency was already too strong in the direction of consolidation. "The liberties of the people and the preservation of the complex federation system would be better insured by confining the Federal and State Governments in their respective spheres already defined for them." The section might be interpreted to refer to Congress the power to judge what legislation was appropriate.

It was uncertain and indefinite, for it could not be conjectured what Congressional action might be deemed appropriate in the extremes to which parties had gone, and might go hereafter. It was the common interest of the people in all quarters of the Union, now that the vexed questions connected with the negro race were all merged and settled in liberation, that the public mind should be withdrawn from anything unpleasant and irritating in the past, and the door be effectually closed, as far as human wisdom could devise, against future agitation and disturbances from these causes. If this second section was incorporated in the Constitution, radicals and extremists would further vex and harass the country on the pretension that the freedom of the colored race was not perfect and complete until it was elevated to social

and political equality with the white. The tendency of the section was "to absorb in the Federal Government the reserved rights of the States and people; to unsettle the equilibrium of the States in the Union, and to break down the efficient authority and sovereignty of the State over its internal and domestic affairs." For these reasons the legislature of Mississippi refused to ratify the amendment.[1] This refusal found precedent in the action of the General Assembly of Delaware, which on the eighth of February, by joint resolution, had pronounced the proposed amendment "a violation of the reserved rights of the several States, contrary to the principle upon which the government was formed, and if adopted a part of the Constitution was an insuperable barrier to the restoration of the seceded States to the Federal Union."[2]

Mississippi was the twenty-ninth State to abolish slavery, but the refusal of its legislature to ratify the amendment seriously interrupted the process of restoring the State to constitutional relations with the national government. It therefore continued under Federal military rule.[3]

In the demoralized condition of society at the South, it was the dictate of wisdom to amend the civil system, so as to adapt it to the new order of things, and produce the

[1] December 4, 1865; Journal of the House of Representatives (Mississippi), November 27, 1865; Journal of the Senate, December 2, 1865. The Resolution as given in Senate Executive Document, No. 26, 39th Congress, First Session, pp. 79-80.

[2] The Senate and House of Delaware not only refused to ratify the amendment, but declared their unqualified disapproval of it. Journal of the General Assembly, Dover, February 8, 1865. In the Senate the amendment was rejected by a vote of 6 to 2. Journal, p. 128.

[3] The President to Governor Sharkey, November 17, 1865. Ex. Doc. No. 26, 39th Cong., 1st Sess., p. 234.

best possible results for both races.[1] The thirteen exceptions to the oath of amnesty made it practically impossible to elect fit delegates to conventions; for the exceptions excluded nearly every intelligent man in the Gulf States. In consequence, President Johnson was early called upon, by Governor Parsons of Alabama to issue pardons to seven candidates, who, he was told, if elected, would be good members.[2] The President quickly complied, and ninety-two delegates assembled in convention at Montgomery, and took the required oath with reference to the emancipation of slaves.[3] The attitude of the delegates toward the great issues of the hour was unmistakable. They quickly introduced an ordinance which declared that the act of secession was unconstitutional and consequently illegal and void, and that a union of the States under one federal head was essential to the existence of the United States as an independent power, without which, credit with the nations of the world could not be supported, nor treaties with them have validity.[4] But though the code and slavery were dead, what was to be done with the negro? The first thing in order was to adopt more stringent laws against vagrancy,[5] and to determine the lawful domestic relations between the blacks.[6] Something must be done to support the old and infirm, the young and helpless negroes.[7] The first step was for-

1 Message of July 20, 1865, Convention Journal, 9.

2 Governor Parsons to the President, September 11, 1865, Senate Executive Document No. 26, 39th Congress, First Session, 45.

3 Journal, 13.

4 Journal, 17-23. Adopted September 25, yeas 92; Journal, p. 59, and Constitution and Ordinances, 48.

5 Journal, 40.

6 September 29. See the ordinance in "Constitution and Ordinances," p. 63.

7 Journal, 42.

mally to abolish slavery,[1] and it was declared that, as the institution had been abolished in the State by the act of the federal government, it should no longer exist, except for the punishment of crime.[2]

The debt, amounting to a little over four millions of dollars,[3] constituting a war debt incurred by the State in aid of the Confederacy, expended for civil and military purposes and the support of indigent families of soldiers, and secured by the issue of six per cent bonds, which had sold at a premium of from fifty to one hundred per cent, was repudiated and declared void. The general assembly was forbidden to make any provision in any manner for the payment of debts incurred directly or indirectly in the Confederate States.[4] But provision was made for the payment of the principal and interest of the legitimate bonded State debt.[5] The President was earnestly requested to remove all United States forces from the State, except the garrison of the coast.[6] Although somewhat unusual for a southern convention, it determined to submit the amendments to the Constitution to popular vote.

The legislature soon assembled and acted on the Thirteenth Amendment,—ratifying it by more than a two-

1 Journal, 44-48.

2 September 22, yeas 89, nays 3; Journal, p. 49. See the Constitution and Ordinances adopted by the State Convention of Alabama, which assembled at Montgomery on the 12th day of September, A. D. 1865, with Index, Analysis, and Table of Titles by J. W. Shepard; Montgomery: Gibson and Whitfield, State Printers, 1865, pp. 80.

The Ordinance was almost identical with that of Mississippi.

3 $4,449,500. Comptroller's Report, September 26, 1865, Convention Journal, 61.

4 September 28, yeas 60, nays 19. Journal, p. 77. Constitution and Ordinances, p. 53.

5 September 29, Constitution and Ordinances, pp. 62-68.

6 Constitution and Ordinances, pp. 70-71.

thirds vote in the House, and by more than a four-fifths vote in the Senate.[1] The same protection was given to the person and property of freed-men as to the non-voting white population of the State.[2] In his telegram to the President announcing these acts, the governor declared that the last step necessary to put the State in line with the President's policy had been taken, and that there need be no fears that the governor-elect would not sustain the Constitution and the Union.[3] He was anxious that Alabama be announced as the twenty-seventh State to ratify;[4] and in acknowledging the gratifying news, Mr. Seward, the Secretary of State, congratulated the governor and the country upon the ratification: "Which vote," said he, "being the twenty-seventh, fills up the complement of two-thirds and gives the amendment the finishing effect as part of the organic law of the land."[5] The Secretary, however, was in error, for ratification by two more States was yet necessary to make the number requisite for adopting the amendment. Alabama was the twenty-fifth State and the second Gulf State to ratify and the thirtieth to abolish slavery.

But Alabama adopted the amendment with the under-

1 December 2, 1865. Documentary History, II, p. 609. The amendment was adopted, Senate, 23 to 5 (Journal), p. 79; House, 75 to 17 (Journal), p. 85, with the understanding, which was expressed in a resolution, that it did not confer upon Congress "the power to legislate upon the political status of freedmen in this State." Annual Cyclopedia, 1865, p. 19. Alabama seems to have ratified the Thirteenth Amendment twice; the second time, July 13, 1868. (Senate unanimously, 27 ayes.) See Laws of 1868, p. 137.

2 Governor Parsons to the President, December 2, 1865. Senate Executive Document, No. 26, p. 247.

3 Governor Parsons to the President, December 9, Id., 247.

4 Parsons to Seward, December 2, Id., 109.

5 Seward to Parsons, December 5, Id., 110.

standing that it did not confer upon Congress the power to legislate upon the political status of freedom in the State.[1] On the thirteenth of December, in the Hall of Representatives, and in the presence of both Houses of the general assembly, Robert M. Patton was inaugurated governor, and received from the provisional governor the great seal of the State.[2]

[1] This resolution passed the House by 75 to 15.

[2] Announcement of Albert Elmore, Secretary of State and Governor Patton to Secretary Seward, December 20, Senate Executive Document, No. 26, pp. 111-112.

CHAPTER V.

THE THIRTEENTH AMENDMENT RATIFIED.

The people of Alabama had been in convention a day when those of South Carolina met at Columbia.[1] There was no money in the treasury to defray the expenses of the provisional government, and they were met by the War Department, so "as instantly to suppress the rebellion."[2] About the time that the convention assembled, the State was greatly agitated over the presence of negro troops, and numerous complaints and petitions for their removal, signed by eminent citizens, reached the Department of State at Washington through the provisional governor.[3] There were two counts against these federal soldiers: first that they were negroes, and, secondly, that they promoted discontent among the freedmen.

The Secretary's reply was firm. The objections, he said, assumed that there was a difference to be made in the war between two classes of the national military forces and that only white soldiers should be employed in some portions of the country, while colored troops should be assigned to distinct and separate regions. No discrimination founded upon color in assignment to service was intended or could be made by the Government.

[1] Among the members of this convention were 47 planters and farmers; 35 lawyers, of whom three were judges; 10 merchants; 10 physicians; 4 clergymen; 3 lawyers and planters; 1 editor, and 1 machinist.

[2] Secretary Seward to Governor Perry, July 22, 1865. Senate Executive Document, No. 26, p. 113. The governor had asked for a quarter's salary in advance, saying, "We have no money in South Carolina at this time." Perry to Seward, July 21, Id., 112. And asked for suitable stationery, August 14th, 115.

[3] See the petition, August 10, Id., 113-114.

The President desired that the people of South Carolina should co-operate with those of other States and soon secure a form of State government adequate to the maintenance of peace and order. When this was done, all national forces, of whatever description, would be withdrawn from the State.[1] It was even more difficult to secure a capable convention in South Carolina than in Alabama, for the amnesty oath was to be strictly enforced. In order to secure a convention the President, at the request of the governor, sent pardons to twenty of the delegates.[2]

In his message to the convention, Governor Perry spoke of African slavery as an institution of the State, cherished from her earliest history, patriarchal in character, under which the negro had multiplied with a rapidity that proved that he had been kindly cared for; but it was gone never to be revived in the State. It had been abolished by the military authority of the General Government. The oath, which the delegates had taken, required them, in good faith, to abolish slavery under the amended constitution of the State. The express terms on which their pardons were issued stipulated that they should never again own, or employ, slave labor.

Undoubtedly the Thirteenth Amendment would be adopted by three-fourths of the States. It would be im-

[1] Seward to Perry, August 26, 1865; Id., 11.

[2] Id., p. 251. Among these were Francis W. Pickens, Governor of the State, 1860-1863. For other pardons asked for and granted at this time see Id., 250-257. The list includes J. L. Warstair; Chancellor Carroll; Ex-Governor Bonham; General M. C. Butler; General Stephen Elliott, the three latter chosen members to the legislature, and C. M. Furman, President of the State. Among the delegates were six who had belonged to the Secession convention of 1860: D. L. Wardlaw, J. L. Orr, J. J. Brabham, John A. Inglis, Henry McIver, John P. Richardson, R. G. M. Dunovant, F. W. Pickens.

possible for South Carolina ever to regain her civil rights and to be restored to the Union, until she voluntarily abolished slavery by her organic law. Until this was done, she would be kept under military rule and the negroes be protected as freedmen by the whole military force of the United States. While most serious evils were anticipated, it was hoped that the freedmen might be attached to the whites by reason, justice and humane treatment, as strongly as they had been under the old condition. The great and sudden change in their condition would at first produce dissatisfaction, idleness and confusion. This, however, would only be temporary. The negro would soon find out that he must work or perish.

It had long been the reproach of South Carolina that her constitution was less popular and republican in its provisions than that of any other State in the Union. Many believed that to this cause alone might be traced the origin of that discontent and dissatisfaction with the federal government, which, after being nursed for a generation, had ended in secession and rebellion. The basis of representation in the State was founded on no just principle of property or population. Now that slavery was abolished, a reformation in this respect was imperative. In considering the question of abolition, it was proper, in some way, to include the freedmen, who took the place of the white men in the lower part of the State, and, to some extent, in the upper.[1] The inclusion was due the lower country, where the negroes outnumbered the whites; "the Federal basis of representation in Congress counting three-fifths of the negroes would seem

[1] The State was divided into two parts, each having its treasurer and some other administrative officers. The southern part was commonly spoken of as "the Lower Country;" the northern, as "the Upper Country."

to be just and right," as it was the compromise agreed on by the framers of the Constitution, and, no doubt, was founded in wisdom.

The question of the suffrage was one of great importance, and must be settled anew. In 1790, the State constitution gave the suffrage to white men of the age of twenty-one, who were property holders, or tax payers. In 1810 the property qualification was abolished, as it was thought proper to allow every white man to vote, who served in the militia or on patrol duty, who worked on the roads, or defended his country in time of war.[1] But to extend universal suffrage to the freedmen, in their ignorant and degraded condition, would be little less than madness. "It would be giving to the man of wealth and large landed possession, in the State, a most undue influence in all elections. He would be able to march to the polls, with his two or three hundred freedmen, all his employees, and thus to control elections. The poor white men in the election districts would have no influence, or their influence would be overpowered by one man of large landed estate."

Did not the free States uniformly exclude the negro from voting?[2] If the New York property qualification for the negro were adopted in South Carolina, very few of its freedmen would ever be able to vote. Even in North Carolina and Tennessee, since the free negroes had been entitled to vote, it was understood "that they seldom saw proper to exercise this franchise." The radical Republican party North were looking with great interest to the

1 In 1865 the Governor of South Carolina was elected by the legislature.

2 For the provisions in the State constitutions on this subject, see my Constitutional History of the American People, 1776-1850, pp. 476-479.

action of the Southern States on negro suffrage, and while they admitted, that a man in order to vote should have a property qualification, and be able to read and write, yet they contended that there should be no distinction between voters on account of color. They forgot that "ours is a white man's government, and intended for white men only," and that the Supreme Court of the United States had decided that the negro was not an American citizen under the Federal Constitution.[1] That each State in the Union possesses the exclusive right to decide for itself who should exercise the right of suffrage was beyond dispute.

The abolition of slavery would give new energy and self-reliance to the people of the State; would stimulate industry and promote economy in all the relations of life. In less than ten years, her people would realize, in the loss of slavery, a blessing in disguise. As she was the first to lead off in the great and most unfortunate secession movement, it now became her duty "to set a bright example of loyalty to the other Southern States, in returning to the Union and cheerfully performing all her obligations to the Federal Government." In returning, she would receive "a restoration of all her civil and political rights as a sovereign State, with general amnesty for the past." The delegates, therefore, should be careful to do all that was necessary to aid the President in carrying out his wise and generous plan of reconstruction. The governor emphasized the fact, remarked to him by many patriots, that the brave men who had imperilled their lives and made every sacrifice in the civil war, had promptly and cheerfully acquiesced in its results; while some of those who had kept out of danger and made no sacrifice, were not inclined to accept the inevitable. The colored

[1] Dred Scott vs. Sandford, 19 Howard, p. 293.

troops, said he, whose atrocious conduct had disgraced the service and filled the public mind with most horrible apprehension, had been withdrawn from the interior of the State and were to be placed in garrisons on the coast, where they could do no further mischief. As the white troops were preserving peace and order, it was thought that their presence would "be necessary in order to enforce the relative duties of the freedmen and their employers."[1]

On the first day of the session, John A. Inglis, who was chairman of the committee which had reported the ordinance of secession on the twentieth of December, 1860, introduced an ordinance to abolish slavery. There was some difference of opinion as to the language most appropriate to be used. Ought not the ordinance to declare that abolition was already effected by the proclamations of the President and by the military authorities of the United States? Or as it was an incontrovertible fact that slavery had ceased to exist, ought it not to declare that any attempt by the State to revive it would be impolitic and disastrous? One member wished the ordinance to read that, as the slaves had been emancipated de facto by the Federal authorities, the institution should never be reestablished in the State. At last, by an almost unanimous vote, an ordinance was passed. Recognizing that the slaves had already been emancipated by the action of the United States authorities, it simply abolished slavery.[2] Ex-Governor Pickens reported an ordinance to repeal the ordinance of secession, and it was carried almost unanimously.[3]

1 Journal of the Convention, 11-19.

2 September 19, yeas 98, nays 8; Journal, p. 64. South Carolina was the twenty-ninth State to abolish slavery.

3 September 19, Journal, pp. 27 and 181. Yeas 105, nays 3.

Perhaps no suggestion, made at this time anywhere in the South, more thoroughly illustrated the transformation which had come in the opinions of many of its people than a set of resolutions introduced on the sixteenth of September. A fundamental difference of opinion, so ran these resolutions, had existed in the country for more than three-quarters of a century prior to the war as to the character, powers and policy of the national and State governments. It was neither wise nor politic for the people of the South to continue, any longer, a contest in which they had been twice defeated; once by political majorities and once by the sword.[1] The people of South Carolina accepted as the results of the war certain principles which they would sustain faithfully as a national policy. These principles were, that the Union is the first and paramount consideration of the American people; that sovereignty resides in the American people and its authorized representative, within the limits of the constitution of the Federal Government; that the general government shall be confined strictly within the limits of the Constitution, and that the inalienable right of each State to regulate its own affairs in its own way shall be acknowledged. As the war was not strictly in the nature of an insurrection or rebellion, justice and wisdom dictated that the pains and penalties affixed to these crimes by the United States, should not be enforced.[2]

It was agreed that the governor should appoint a commission to prepare and submit to the legislature, a code for the regulation of the labor and for the protection and government of the colored population.[3] A month later, the commission reported a code, which, for a time, be-

1 The election of Lincoln and Hamlin.
2 Journal, 41-42. The resolutions were not acted on.
3 Journal, 103.

came the law of the State.[1] It attempted to define and regulate the civil and industrial interests of the freedmen and their relation to the white race. Having abolished slavery and having repealed the ordinance of secession and provided for the protection and government of the former slaves, the work of the convention drew to a close. No action was taken respecting the Confederate debt. In the belief that they represented the people of the State, the delegates nominated as a candidate for governor one of their number, James L. Orr,[2] who had been the Speaker of the Thirty-fifth Congress,[3] and also a foremost member of the secession convention of 1860. But the people took offense at the nomination and voted for General Wade Hampton, "though there was no political question in the election."[4] On counting the votes it was ascertained that Orr was elected by a small majority, and, on the twenty-ninth of November, he was inaugurated governor.[5]

Meanwhile the President had been solicitous about the action the legislature might take respecting the Thirteenth Amendment, and what it might decide as to the debt which the State had created in aid of the rebellion. He telegraphed to Governor Perry, as he did later to the provisional governor of Mississippi, that if the action of the convention was in good faith, the legislature should not hesitate to make the amendment a part of the Constitution of the United States.[6] Thirteen days later, the legis-

1 See Senate Executive Document, No. 26, Report of the Committee on the Code, October 25, pp. 175-197.

2 Governor Perry to President Johnson, October 27: Senate Executive Document, No. 26, p. 253.

3 December 7, 1857, to March 3, 1859.

4 Ib.

5 Governor Perry to the President, November 29; Id., p. 25.

6 The President to Governor Perry, October 31, 1865; Id., p. 254.

lature ratified the amendment, but added a resolution, that any attempt by Congress toward legislating upon the political status of former slaves, or on their civil relations, would be contrary to the Constitution of the United States as it was, or, as it would be, if altered by the proposed amendment—and would be in conflict with the policy of the President declared in his amnesty proclamation, and with the restoration of that harmony upon which the vital interest of the American people depended.[1]

North Carolina, like South Carolina, had no funds with which to meet the expenses of reorganization, and the greater part was borne by the War Department. A quantity of cotton and resin, which had not yet been seized as insurgent property, was judged by the President properly convertible into available funds as a further means of meeting its expenses,[2] and the convention was declared to possess the power to levy taxes, and to enforce their collection. It was even more difficult to secure a convention here than in South Carolina, or Mississippi, and the President acting as formerly on the principle that an election of delegates was evidence of their fitness, freely pardoned all who had not as yet taken the oath.[3] The discussions, though they seemed somewhat perfunctory, clearly reflected the opinions of the hour. The question whether a State could secede from the Union, which had so long agitated the country, it was now said, was fully

[1] Bulletin of Bureau of Rolls and Library of the Department of State, No. 7, September 18, 1894, pp. 605-606 (Doc. Hist. II), November 13, 1865. It was nearly unanimous in the Senate, and by 74 yeas and 24 nays in the House. South Carolina was the twenty-fourth State to ratify.

[2] Seward to Governor Holden, July 8, 1865: Senate Executive Document, No. 26, p. 117. Holden to the President, June 13, Id., 220.

[3] Id., 223-224.

and finally answered by the war.[1] The ordinance of secession was repealed,[2] and slavery was abolished by a unanimous vote.[3]

But no such harmony prevailed in the debate on the State debt. Wearied with the war, and at no time its most ardent advocate,[4] the majority of the people of the State were now opposed to assuming this debt made in aid of the rebellion.[5] But as the debate became more bitter, it threatened to break up the convention, and the provisional governor appealed to the President for advice. "Every dollar of the debt created to aid the rebellion against the United States should be repudiated finally and forever," was the reply. So prompt and forceful a reply had an immediate and happy effect upon the delegates,[6]

[1] North Carolina Convention Journal, pp. 21-22.

[2] October 6 the exact vote is not recorded, but the repealing ordinance passed its second reading by 105 yeas to 9 nays, Journal, pp. 23-24. Ordinances and Resolutions, Id., p. 39.

[3] October 7, Journal, pp. 28, 29, 30 and 31. Ordinances and Resolutions, p. 40, where the 9th of October, the day of enrollment is given is the day of the Ordinance. North Carolina was the thirty-first State to prohibit slavery.

[4] See Acts of the Legislature of North Carolina, December 9, 1862: protest against confiscation of cotton by the Confederate government, December 12, 1863, and May 28, 1864; also against the abuse of the habeas corpus by the Confederate government, May 28, 1864; May 25, 1864, approving the action of the public treasury in refusing the Treasury Notes of the Confederate States of America at par issued prior to February 17, 1864; December 23, 1864, joint resolution, "Protesting against the cruel and inhuman manner in which slaves were conscripted from North Carolina;" December 23, 1864, two protests against conscription; February 1, 1865, protest against the proscription which was likely to close all mills and mechanics of the State; February 3, 1865, protest against the arming of slaves by the Confederate government; February 1st, protest against C. S. A. Impressment Laws; February 6, against the abuse of the right of habeas corpus by the Confederate government.

[5] Governor Holden to the President, October 17, Id., p. 226.

[6] Governor Holden to the President, Id., p. 227.

who decided the great mass of the people should not be taxed to pay a debt incurred in carrying on a war which they had opposed.[1] The matter was discussed, more or less, for two weeks, but was settled at last by declaring the debt void, and by forbidding the legislature to provide for the payment of any portion of it.[2]

As in South Carolina, so here, the convention empowered the provisional governor to appoint a commission to report to the legislature a system of laws on the subject of freedmen,[3] and like the commission in that State, it soon reported an elaborate code, which was intended to protect their persons and property. One provision was an innovation in the law—that negroes were competent to give evidence in court in cases involving the rights of property.[4] The President was as anxious that the legislature should ratify the pending amendment as that the convention should repudiate the Confederate debt.[5] His wishes were soon realized, for the legislature adopted the amendment with but six dissenting voices.[6]

[1] The President to Governor Holden, October 18, Id., p. 226.

[2] October 19, Journal, p. 91; Ordinances and Resolutions, p. 66. The principal objection raised against the ordinance was that the matter could more wisely and expediently be left with the General Assembly. Journal, p. 92.

[3] October 18, Journal, p. 81; Ordinances and Resolutions, p. 73.

[4] For the report of the commission, see Senate Executive Document, No. 26, pp. 48, 55.

[5] Seward to Governor Holden, November 21, Id., p. 47.

[6] Governor Holden to the President, December 1, Id., p. 228. For the ratification which bears the date of December 4, 1865, see Bulletin of the Bureau of Rolls and Library of the Department of State, No. 7, September 18, 1894, pp. 607-608 (Doc. Hist. II). North Carolina was the twenty-sixth State to ratify. The ratification, in the House, November 29, 1865, was by 100 ayes to 4 nays; in the Senate, December 1, the rules were suspended, the resolution of ratification read a third time, and passed without calling the roll. Senate Journal, p. 33.

At the State election, which followed soon after the adjournment, Jonathan North was chosen governor, and the civil organization of the State fully provided for. The legislature chose William A. Graham,—an ex-member of the Confederate Senate,—United States Senator. The friends of Thomas L. Clingman, who, with other southern Senators, had retired from the Senate soon after the inauguration of President Lincoln, were urging in the State Senate, that he was entitled to the two years' term.[1] But the President, whose policy was primarily to reorganize the State governments, did not wait for the action of Congress toward the Representatives and Senators from North Carolina, but dispatched to Governor Holden notice that he was relieved from the responsibility of his office; and on the twenty-third of December, the great seal of the State was transferred to the governor elect.[2]

In Georgia the question speedily arose whether a citizen, who had taken the oath of amnesty, who had applied for pardon and had been recommended by the provisional governor, was entitled to vote, or, to a seat in the convention.[3] The President answered this in the negative. The amnesty oath and the petition were the only evidence of loyalty; but he declared his willingness to pardon all who deserved it, by the time their vote was needed.[4] In consequence of this liberal policy the Milledgeville convention assembled on the twenty-fifth of October with a full list of delegates. Greatly distinguished among them and chosen permanent president of the convention, was

1 Governor Holden to the President, December 4, Id., p. 228. Mr. Clingman retired from the Senate July 11, 1861, his term of service there beginning November 23, 1858.

2 Holden to Secretary Seward, December 23, Id., p. 48.

3 Governor Johnson to the President, September 8, 1865. Senate Executive Document, No. 26, p. 235.

4 The President to Governor Johnson, September 9, Id., p. 235.

Herschel V. Johnson, the candidate for Vice-President with Douglas in 1860. Of the many critical questions demanding settlement, the debt of the State, amounting to nearly twenty-one millions of dollars, was among the chief.[1] Of this amount, eighteen millions had been created in aid of the rebellion.[2] To assume this debt, excepting the portion contracted prior to the war, said the provisional governor in his message, would impair the public credit, would increase taxes, deter immigration, prevent capital from securing investment in the State, and embarrass its people in a variety of ways for years to come. Nothing would be gained by transferring the solution of the question to the legislature. The convention, from the nature of its powers, should settle the matter. It should also put on record "the acknowledgment of the accomplished fact" of abolition, and, while guarding the community from the evils of sudden emancipation, should secure the freedmen in the enjoyment of their legal rights.[3] But the delegates, less inclined than the governor to repudiate the war debt, hesitated, and he appealed to the President for advice.[4]

Assured that any recognition of the obligation of the debt would cause the President to refuse to recognize the people of the State[5] as having resumed relations of loyalty, to the Union, the convention on the last day of the session, declared the debt null and void.[6] The ordinance of

[1] $20,813,525.

[2] $18,135,775. Message of Governor Johnson, Journal of the Convention, p. 11.

[3] Journal, 12-13.

[4] Governor Johnson to Seward, October 27. Senate Executive Document, No. 26, p. 81. Convention Journal, 103.

[5] Seward to Governor Johnson, October 28: Senate Executive Document, No. 26, p. 81. President Johnson to the Governor, October 29, Journal of the Convention, 61.

[6] November 8, 1865, Journal, 193; Appendix, p. 234.

secession was repealed.[1] But the abolishment was made, because the institution had already been destroyed by the government of the United States as a war measure and the ordinance included in the proviso an indirect condition that this acquiescence in the action of the government was not intended to relinquish any claim which a citizen of Georgia might make upon the United States for compensation for slaves. Unlike the adjoining States, Georgia abolished slavery, not by an ordinance, but by a clause in its amended constitution.[2]

If we seek for some explanation of the peculiar phraseology of its new constitution, we doubtless find it in the resolutions introduced on the seventh of November, though not acted on. The State, it was said, before being permitted to resume its former position, and to enjoy its civil rights in the Union, was required to prohibit slavery in its constitution. Its people regarded slavery as consistent with the dictates of humanity and the strongest principle of morality and religion. In their judgment, the negro race, under the system of slavery now abolished, had attained to higher conditions of civilization, morality, usefulness and happiness, than it had under any other circumstances, or in any other portion of the globe. They were convinced that the destruction of slavery at the South was not only a great injury to the white race, but would prove a great curse to the black. Yet, as slavery had been destroyed by the action of the general government, the alternative was presented, either to recognize the fact in the State constitution, or to live perpetually under military rule. Abolition, therefore, was only yield-

1 October 30, Journal, 62 and 22. Slavery abolished October 27th, Journal, 38-45. Georgia was the thirty-second State to prohibit slavery.

2 Article I, Declaration of Rights, Section 20.

ing to overruling necessity.[1] A month after the adjournment of the convention, the amendment was ratified without debate, and almost unanimously, by the legislature.[2] At the same time, the Judiciary Committee of the House was instructed to report a law protecting freedmen in their persons and property, and also another, permitting them to testify in cases in which they might be interested.[3] The civil organization of the State having been made complete by the elections, Jenkins, the governor-elect was inaugurated on the fourteenth of December, in pursuance of the President's plan of reconstruction.[4]

As Georgia was the twenty-seventh State to ratify the amendment, Secretary Seward, on the eighteenth of December, issued a proclamation announcing that it had become a part of the Constitution of the United States.[5] Oregon ratified on the eleventh;[6] and California on the twentieth.[7]

[1] Journal, 191.

[2] December 9, 1865. In the House, the yeas and nays were not recorded; in the Senate, the vote was 26 ayes and 14 nays. See the act of ratification in the Bulletin of the Bureau of Rolls and Library of the Department of State, No. 7, September 18, 1894, pp. 612-616. (Doc. Hist. II.)

[3] Governor Johnson to the President, December 6, 1865. Senate Executive Document, No. 26, p. 240.

[4] Governor Johnson to the President, December 10, December 15. The President to Governor Johnson, December 8. Id., pp. 240-241.

[5] The Proclamation dated December 18, 1865, is given in Bulletin of the Bureau of Rolls and Library of the Department of State, No. 7, September 18, 1894, pp. 636-637 (Doc. Hist., II). Also in Statutes-at-Large, Vol. XIII, pp. 774-775.

[6] Bulletin No. 7, Department of State, pp. 617-618 and 619-623. In the House, December 8, 28 to 4; in the Senate, December 6, 13 to 3. For a brief account of Oregon's ratification, and of its treatment of the Fourteenth and Fifteenth Amendments, and of the proposed Thirteenth of 1861, see an unsigned article, by Henry E. Reed, in the Morning Oregonian, Portland, March 9, 1899.

[7] To guard against delay or loss by reason of possible interruption of the mails on the overland route, a duplicate copy of

Florida, meanwhile, had been under military rule, the two races, living, as the provisional governor reported, in peace and tolerable harmony.[1] Though it was generally conceded in the State that the theory of secession had been proved false by the results of the war, it was remarkable that, as a rule, the most zealous original secessionists accepted the results in better spirit than the original Union men, who, dragged into the rebellion against their will, afterward had heartily co-operated with it. The opinion prevailed among the colored people that, on next New Year's day, the lands, mules and wagons in the State were to be divided among them, and their disappointment, it was feared, would make trouble. The convention, it was expected, would abolish slavery in good faith; but the legislature would feel reluctant to ratify the Thirteenth Amendment, because it would thereby assist in imposing abolition upon Kentucky and Delaware, which had not yet abolished slavery.[2]

Assured by the President that abolition and ratification were conditions of restoration to the Union, the convention assembled on the twenty-fifth of October, annulled the ordinance of secession,[3] abolished slavery,[4] admitted colored persons to testify as witnesses, the jury to be judge of the credibility of the testimony,[5] and repudi-

the joint resolution of the legislature of California was sent, by Governor Frederick F. Low, to Secretary Seward, by the steamer mail via. Panama, on the 30. Bulletin, No. 7, p. 621. (Doc. Hist., II.) In the Assembly the vote was 62 ayes to 16 nays, December 6, 1865; in the Senate, December 15, 1865, 35 ayes to 4 nays.

1 Senate Executive Document, No. 26, p. 203.

2 Governor William Marvin to Secretary Seward, October 7, 1865, Id., pp. 205-206.

3 October 28.

4 November 6. The thirty-third State to prohibit slavery.

5 26 to 9.

ated the Confederate debt.[1] In his message to the convention, Governor Marvin, after reviewing the recent action of the Gulf States, declared that, while emancipation of the negro made it necessary to define his civil rights and political privileges, in the constitution, with as much accuracy as possible, it was not to be expected that two races, nearly equal in number[2] and so unlike as the negro and the white, could live in peace and harmony, unless the rights of each were well defined by law. The governing power was in the hands of the white race; but the colored man was to be free, and the government was to be ministered in such a manner as not to infringe upon his freedom. While this freedom was difficult to define, it might be said, in general terms, to consist chiefly in the right to be protected in the enjoyment of life and property; in the right to personal security and locomotion, to intellectual, moral and religious improvement and to the transmission of property to heirs. "But freedom does not necessarily include the idea of a participation in the affairs of the government. The privilege of voting at elections, the capacity to hold office, or to sit on juries are not its essential rights. They are the privileges conferred, or duties enjoined upon certain classes of persons by the supreme power of the State for the public good." The English people were free, yet not one-tenth of the adult male population were entitled by law to vote at the elections or to sit on juries. In Florida, foreigners could not vote nor be jurymen unless naturalized; yet they were free.

The subject of the elective franchise must necessarily

[1] November 6-7 the Ordinances are given in Senate Executive Document, No. 26, pp. 211-213.

[2] In 1860 the white population of Florida was 77,748; the colored 62,730, of whom 932 were free.

come before the convention. Should it be conferred upon the colored race? If the convention abolished slavery and provided proper guarantees for the protection and security of the persons and property of the freedmen, Congress would hardly refuse to admit the Florida representatives and senators to their seats, because the freedmen were not allowed to vote. The public good of the State and of the Nation at large would not be promoted at this time by conferring the elective franchise upon the negro. The two races were not prepared for so radical a change in their social relations. There was little reason to believe that any large part of the freedmen desired to possess the elective privilege. They sought only the same protection for their rights as that given to the white man. If properly protected, they doubtless would soon adapt themselves to the new condition. They might also be stimulated to labor, said the governor, "by making vagrancy an offence punishable by temporary, involuntary servitude. They must be excluded wholly from any participation in the affairs of the government.[1] The convention acted on this and other suggestions in the message and made the vagrancy act apply to negroes who were the subject of complaint by white persons, under oath, before any justice of the peace or before the Circuit Court. When accused, the offender, unless satisfying the Court, was required to give bond to the governor to the amount of not more than five hundred dollars for good behavior and future industry for one year. Failing to give security, he should be indicted as a vagrant, and, on conviction, pay a fine equal to the bond, and be imprisoned for not more than twelve months, or, at the discretion of the Court, be sold for the same period.[2] The act, by re-

[1] Id., 209-211.

[2] Ordinance of November 4, 1865; Id., 212.

quiring only complaint and conviction by hostile white men, practically made every negro in the State a vagrant.

The President was notified that the ratification of the Thirteenth Amendment would depend upon the action of Alabama and Georgia. If these ratified, the Florida legislature would do the same; otherwise there would be difficulty.[1] The President promptly pronounced the condition "improper and inadmissible."[2] Not until the twenty-eighth of December did the legislature act, when, by a joint resolution, which evidently contained all the ideas of negro suffrage which the Governor had expressed in his message, it ratified the amendment, with the understanding that it did not confer upon Congress the power to legislate on the political status of the freedmen in the State.[3] Meanwhile the amendment had been under consideration in northern legislatures, and on the fourth of January, New Jersey and Iowa adopted it.[4]

Early in December, 1865, the provisional governor of Texas received from Secretary Seward a copy of the Thirteenth Amendment to be submitted to the legislature.[5] But this was not the first notice of the amendment he had received. The President had called upon him in October

[1] Governor Marvin to Secretary Seward, November 18. Id., p. 215.

[2] Seward to Governor Marvin, November 20. Id., p. 215.

[3] Documentary History, II, 624-626. The ratification is also given in Senate Executive Document, No. 26, p. 219. In the Senate, December 27, 19 ayes to no nays; in the House, December 28, 36 ayes to 2 nays.

[4] New Jersey, January 23, 1866. See the ratification in Documentary History, II, p. 627. The vote in the Senate was 11 yeas and 10 nays; in House 34 yeas and 24 nays.

Iowa ratified unanimously in both Houses, January 24, 1866. See Bulletin, No. 7, pp. 629-633. (Doc. Hist., II.)

[5] December 9, 1865; Governor A. J. Hamilton to Secretary Seward; Senate Executive Document, No. 26, p. 96.

for a report of the work of the State convention, but it was the seventeenth of November before the Governor issued his proclamation for the election of delegates on the eighth of January, and named the seventh of February for the meeting of the convention.[1] In his message to this body, he justified his action in not calling the convention in September; at that time the majority of the people of the State were not registered as voters, and there was no money to defray the expenses of the convention. Excepting its recommendation on negro suffrage, the message was similar in character to messages issued by other provisional governors, and made similar suggestions.[2]

The pro-slavery element in the convention was strong, as shown by the large vote on the twenty-sixth,[3] against the ordinance abolishing slavery. By a slightly smaller majority, the ordinance of secession was declared null and void.[4] This ordinance provoked a long and somewhat angry debate. Should the act of secession be "annulled," or "repealed," or simply "renounced?" Should it be declared "null and void from the beginning," or simply "void from this time?" By a majority of two votes it was decided to be null and void from the beginning.[5] But the larger and final vote declared that it was simply "null and void."[6] The significance of the vote consisted in the disclaimer of the right of secession. The Confederate war debt was declared void.[7]

1 President Johnson to Governor Hamilton, October 30; the Governor to the President, November 17, 1865. Id., 242.

2 Journal of the Texas Convention, p. 627.

3 56 yeas and 26 nays; thus making Texas the 34th State to prohibit slavery. Journal, 100.

4 March 15. Journal, 184.

5 Journal, 158.

6 55 to 21. Journal, 184.

7 Journal, p. 190.

The radical Union men were in the minority, but the convention enrolled many violent and impracticable members.[1] The relatively small majority for the measures upon which the restoration of the State to Federal relations depended, suggests the almost hopeless diversity of prevailing opinions.

The convention made no change in the qualification of the elective franchise, but continued the old exclusion of "Indians not taxed, Africans and their descendants."[2]

Governor Marvin of Florida had marshaled the principal arguments against negro suffrage, but it was in the Texas convention that the most forceful appeal was heard for negro suffrage, made anywhere North or South at this time. The appeal for the extension of the right of voting to the colored citizens of the State was not for the purpose of establishing any new principle, it was said, but to give practical effect to the American theory of government and to return to the usages adopted by the founders of the republic. The Jeffersonian ordinance of 1784[3] for the government of the Northwest, had not discriminated against the negro, and the ordinance of 1787 gave free male inhabitants the right to vote.[4] While the Articles of Confederation were in force, free men of color had voted in some States,[5] and the Federal Convention had refused to limit the suffrage to free white inhabitants, a proposition for this purpose submitted by South Carolina receiving the vote of only one other State.[6] In Massa-

[1] Governor Hamilton to the President, February 11, 1866. Senate Executive Document, No. 26, p. 242.

[2] Texas Constitution, 1845; Article III, Section 1.

[3] See pp. 1-4, Vol. II.

[4] Ib.

[5] Vt., Mass., N. J., Pa., N. C.

[6] The statement is erroneous. Probably the speaker referred to the refusal of Congress, June 25, 1778, to adopt the amendment

chusetts, New York, New Jersey and Pennsylvania, every free man had at some time been permitted to vote.

Maryland, North Carolina and Georgia and the southern States generally, excepting South Carolina, had given free men the right. For nearly forty years the colored man voted in Tennessee;[1] and the legislature of Colorado, in its first session in 1861, had given the right to vote without distinction of color or race. To every State in the Union the United States guaranteed a republican form of government. Had not the Joint Committee on Reconstruction in Congress already proposed an amendment to the National Constitution, which provided among other things, that whenever the elective franchise should be denied or abridged in any State on account of race or color, all persons of such race or color should be excluded from the basis of representation.[2] This amendment, or an equivalent, would undoubtedly soon be ratified and would apply to all States where the suffrage was based on color, although practically the effect would be chiefly felt in the late slaveholding States.

If the colored race were to be counted on the basis of representation but were disfranchised, the whites, in the late slaveholding States, would be represented in Con-

to the Articles of Confederation urged by South Carolina, to limit the "privileges and immunities of citizens," in the fourth article, to free "white" persons. See Elliot, I, 90. But doubtless the statement, as preserved in the text, counted as a fact with some members, and doubtless with the speaker. He seems to have thought that the National Constitution conferred or limited the franchises.

[1] 1796-1834. For an interesting account of the method pursued in Tennessee to deprive the free negroes of the franchise, by the constitution of 1834, see Caldwell's Constitutional History of Tennessee, 144.

[2] The reference is to the Fourteenth Amendment, at the time under discussion in Congress, and passed as a joint resolution on the 16th of June, 1866. See pp. 235-277.

gress by thirty-three more members than an equal white population in the North; but if the negro was enfranchised and included in the basis of representation, the South would go back into the Union with thirteen more representatives than it had in the time of slavery. If the South should follow the example of Texas, refuse to enfranchise the negro and exclude him from the basis of representation, it would return to the Union with at least twenty members less in the House of Representatives than it had in 1860. Should Texas, by including the negro in the representation basis increase its political power as a State or diminish it by allowing one-half of its inhabitants to be unrepresented?[1]

Governor Hamilton's message to the convention differed essentially on the negro question from that of any other provisional governor in the South. "If by the declaration that this is a white man's government, it is meant," said he, "that the black man is to be excluded from its benefits, and forever debarred from the exercise of political privileges in it, then I must respectfully take issue with the proposition." The election of the President of the United States might be determined by the votes of black men in the State of New York. If in the past black men had enjoyed civil rights and been admitted to the exercise of political privileges in the government of the United States, was it likely that after the act of emancipation, which, he said, was regarded by a majority of the Nation as a great and glorious event in the history of the human race, negroes would not in due time enjoy the rights and privileges of the white race? Exclusion merely on account of the accident of birth or color was unwise. Political privileges should depend upon rules of universal

[1] In 1860 the white population of Texas was 421,294; the negro population was 182,921, of whom 355 were free persons.

application, and no man, who was qualified intellectually and morally,[1] should be deprived of voting.

To extend the right of suffrage to the freedmen, it was urged by a member, would elevate them in their own estimation, give them increased importance in the community, and effectually protect them against oppression. They would be taxed to support the government like other persons, and if ever the necessity arose, they would be required to shed their blood in defense of the common country. Why, then, deprive them of the rights of citizenship? The objection that they were ignorant was true of many white men, and, even if it held good at this time, it would apply with ever-diminishing force as time went on. But, it was said, the negro's vote would be controlled by his late master. Even if this were true, was the answer, as white men usually divide into political parties, so the colored vote would be divided. Who of the late slaveowners really believed that they could control the votes of their emancipated slaves?

But if the negro was enfranchised, would it not result in a war between the races, of which history gives many accounts, with injustice and oppression at the hands of the superior race? "Wrong and injustice," was the reply, "may be submitted to for a time, but the hour of retribution is certain to come; therefore, if we would live in peace and harmony with the colored race, from which we cannot be separated, and whose destiny is so indissolubly interwoven with our own, we must do them no wrong, practice no injustice upon them, but being a superior race protect them from all harm, and bestow upon them every right and privilege which their changed condition justly

[1] Governor's Message, Journal, 25-26.

demands."[1] In the light of events this appeal for the extension of the suffrage was one of the most remarkable in our history; but it was in vain.

Four years passed before the legislature of Texas ratified the Thirteenth Amendment. Meanwhile the Fourteenth and Fifteenth Amendments had been ratified by three-fourths of the States, which practically gave the franchise to the freed-men.[2]

When the Thirteenth Amendment was adopted, the negro population of the United States numbered a little more than five millions, of whom about four and a half millions had shortly before been slaves.[3] The half-million of the race, known to the law as "free persons of color," and scattered over the Union in varying numbers, from less than two hundred in Oregon, whose constitution excluded them, to more than ninety thousand in Maryland, where for many years efforts had been made to get rid of them, were forever relieved from their long haunting fear of being returned to slavery. Among this vast negro population, which was nearly twice as great as the entire population of the country in 1776, there were not above ten thousand persons who, by the letter of the law, might

[1] Journal, pp. 81 and 91. This minority report of February 24th was submitted by Edward Degener of Bexar County.

[2] February 18, 1870. For the ratification of the Thirteenth Amendment, see the Bulletin of the Bureau of Rolls and Library of the Department of State, No. 7, September 18, 1894, pp. 634-635. (Doc. Hist. II.)

On this amendment, Texas was the twenty-ninth State to act, and on the day when it ratified the Thirteenth, it also ratified the Fourteenth and Fifteenth.

[3] 4,650,517 slaves in 1865; 518,468 free persons of color. The number is computed from the census returns of 1860, on the basis of increase given for the several States.

vote.[1] Nearly nine thousand of these lived in New York, and the remainder in New Hampshire, Vermont and Massachusetts. It is not probable that of the ten thousand free negro men in the North, above the age of twenty-one, one in ten was suffered to vote, or ever went to the polls.[2] Not one person of pure African blood, or of the fourth generation from a negro ancestor, held office, civil or military, in any State in the Union, or under the National Government. The general condition of the race was one of pitiful degradation. North and South have ever been notoriously unfriendly to the free negro and the recent slave was now stepping into the free negro's shoes.

North and South, it was the white man's government. The utterances of the South on white supremacy expressed, in these passionate days, a truth proclaimed and reiterated, in the speech of white men all over the land. The feelings of the white population of New Hampshire, Vermont and Massachusetts toward the few negroes in their midst is not a true measure of public opinion in other free States at the time. New York tolerated the negro, but its recent overwhelming vote[3] against removing electoral disqualifications against him indicated plainly the place in which it intended to keep him. The great West, though rejecting slavery, did not welcome free negroes. It excluded them from any participation in civil affairs. Unwritten law excluded the free negro from industrial,

[1] The number of free persons of color in New Hampshire, Vermont and Massachusetts was 12,043; in New York, 52,367, computed as above.

[2] This statement is based on the condition of the free negro population of the State of New York, as portrayed in the debates of the Constitutional Conventions of 1846 and 1868. So much may be found in them to corroborate the statement, a general citation is all that is here necessary.

[3] See note, p. 172.

social and educational privileges nearly everywhere in the North.[1] Yet there were compensations for emancipation. The burden of slavery would be rolled away. Immigration to the South would develop its almost untouched resources. Free labor would prove cheaper and more remunerative than slave. And to these advantages, freely pointed out, was added the prospect, however remote, of a gain of at least thirteen members in Congress in consequence of admitting the freedmen into the basis of representation.

Emancipation was forced upon the South. As repeatedly declared by its conventions, abolition had been effected by the United States in the exercise of the war power. The abolition acts of the former slave-holding States were merely an enforced registry of the fact. War had changed the old feelings of the whites toward the negroes. Georgia voiced the whole South when, in abolishing slavery, she declared that it would be better for the negro to remain in slavery. Yet he should have his rights of person and property duly guarded by the State. Let him work, let him make contracts, let him testify in court. But save the South from the evils of negro vagrancy; for every white man knew that even the ameliorating influences of slavery had not eliminated savagery from the African's breast. The stoutest heart might well tremble at the thought of four millions of negroes, born slaves and descended from slaves for ages, suddenly set loose amidst a white population not much greater in numbers.[2]

But in abolishing slavery, the Southern States were

[1] For an account of the attitude of the North toward free negroes, see my Constitutional History of the American People, 1776-1850, Vol. I, Chap. xii, and Vol. II, Index "Negroes."

[2] See pp. 88, 105, 238, 290, 344.

promised the restoration of their civil rights and a renewal of their old federal relations. These were the conditions of abolition—bitter but inflexible. Kentucky and Delaware refused to emancipate and the National Government could not dictate to them as it could to the Gulf States. But another condition was implied in President Johnson's reconstruction policy; the ratification of the thirteenth amendment. It could not become a part of the Constitution without the concurrence of four States south of Virginia. Its ratification by South Carolina, Alabama, North Carolina and Georgia made it the law of the land. Mississippi refused to ratify, for fear of Congress. Might it not attempt to legislate on the political status of the negro? South Carolina and Alabama ratified, as did Florida later, with the understanding that such legislation should never be attempted. They considered abolition a sacrifice and a sufficient price for the restoration of Federal relations and the withdrawal of Federal troops. The solitary voice heard in the Texas convention for negro suffrage was the only appeal for an amendment "to provide for the prospective admission of the freedmen to the right."[1]

It might be thought that the adoption of the Thirteenth Amendment, by which slavery was forbidden throughout the land, would be the last instance of incorporation of an abolition clause in an American constitution. In becoming a part of the national instrument in 1865, it thereby became part of every State constitution then in existence, and all that were to come would find it a part of the supreme law of the land. But the momentum of a great organic act, embodying, as did this, an entire change in racial relations within the republic, later carried the provision into six State constitutions, and of these five were

[1] Journal, Texas Convention, p. 91.

of new States. Nebraska, in 1867 and again in 1875;[1] Colorado in 1876;[2] North Dakota[3] and Montana[4] in 1889, included the anti-slavery clause in their Declarations of Rights. This appears to have been done without debate or memorable objection.[5]

In none of these States was it a party measure; for the majority in the North Dakota convention were Republicans, and in the Montana, Democrats.[6] Neither was the reason for the adoption of the provision, in these new States that which prevailed in Kentucky in 1890. When, in February, 1865, the legislature of this State, by a vote of nearly two to one, rejected the Thirteenth Amendment,[7] and the State refused to abolish slavery by an act of its own, no man living imagined that the time would come when a Kentucky constitutional convention, in order to avoid antagonizing the negro vote in the State, would put an anti-slavery clause in a constitution—and do this a quarter of a century after slavery had been abolished, by an amendment which a Kentucky legislature had re-

[1] Constitution of Nebraska, 1867, Article I, Section 2; 1875, Article I, Section 2.

[2] Constitution of Colorado, Article II, Section 26.

[3] Constitution of North Dakota, Article I, Section 17.

[4] Constitution of Montana, Article III, Section 28.

[5] Debates of North Dakota Convention, p. 537; Journal of North Dakota Convention, pp. 159, 167, 185, 220, 269. Adopted—57 yeas, no nays. The Proceedings of the Montana Convention as reported in the Helena Journal; the Helena Journal; the Helena Independent and the Morning Oregonian, indicate no discussion of the clause.

[6] Recent Constitution-making in the United States. North Dakota, South Dakota, Montana, Washington. Philadelphia, 1891: American Academy of Political and Social Science, pp. 5-7.

[7] February 22, 1865, in the Senate, 21 nays, 13 yeas; in the House, 56 nays, 28 yeas. Senate Journal, p. 391; House Journal, p. 579. For the attitude of Kentucky toward the question of Slavery, in 1849-1850, see the Constitutional History of the American People, 1776-1850, Vol. II, Chaps. i, iv, v, vi.

fused to ratify. Kentucky did not introduce slavery into her own domain, nor, by any act of hers, did she abolish it until 1890. "If you leave the clause out," said a member of the convention of that year, "there will be twenty-five thousand votes in this State against this constitution."[1] But the clause was inserted,[2] though not without protest from members, and also from colored citizens of the State who wished "to omit any reference whatever to the colored people as a class."[3]

A very significant reason was given, however, why the clause should be adopted. "At the time of the Paris Exposition of 1889," said a member, "the governors of the States in our Union were requested to send copies of their constitutions that they might be laid before the nationalities whence emigration came. The Governor of Kentucky refused because its constitution was in apparent conflict with the Constitution of the United States on the subject of slavery, and a long and difficult explanation would be necessary to make clear to the foreigner that the Constitution of the Nation over-rode that of Kentucky."[4] Industrial and political expediency led the State to conform at last, in the letter of its organic law, to a change made twenty-five years before and with which it had all these years been conforming in practice. Yet it was the dictates of industry and politics that compelled all the States to abolish slavery. Kentucky and Delaware could not be exceptions to a principle of civilization. This principle, expressed in 1776 in the familiar language of the Declaration of Independence, lay behind the action of

1 Debates of Convention of 1890, Vol. I, p. 442.

2 Id., 1019. (October 30.)

3 Id., 811-812. The protest from negroes was signed by teachers and clergymen of the race.

4 Id., 1017.

the States in 1865 in abolishing slavery, and in adopting the Thirteenth Amendment.

The amendment declared the colored as free as the white race, but gave the colored race nothing more than freedom.[1] The friends of the race were soon convinced that something more was needed; the negro should be recognized as a citizen of the United States; that he could protect himself. This meant the extension of political rights to him. The Republicans took up this solution of the problem and proposed it, as a Fourteenth Amendment, to the people of the States.

[1] Bowlin vs. Commonwealth, 2 Bush, 5.

BOOK VI.

THE EXTENSION OF THE SUFFRAGE.

CHAPTER I.

SHALL THE NEGRO BE GIVEN POLITICAL RIGHTS?—CONGRESS PROPOSES A FOURTEENTH AMENDMENT.

The chief obstacle to national peace and harmony, it might seem, had now been removed by the abolition of slavery, but this radical change in the American system of government, affecting the condition of nearly five millions of the population compelled other changes equally radical, but more difficult. There were at this time over a million negroes in the country above twenty years of age, and, save some sixty-two thousand, all were in the former slaveholding States. Of white males over twenty years, there were about two millions in these States and nearly five and a half millions in the old free States. In other words, in the South, there was one negro of voting age to every two whites; in the North, eighty-four whites to every negro. In South Carolina and Mississippi, the negro males, above twenty years of age, outnumbered the whites; in Louisiana, the races were equal in number; and in Georgia, Alabama and Florida, nearly so. In the aggregate, one-seventh of the male population of the country, old enough to vote, consisted of negroes.[1]

But North and South had long been hostile to negro suf-

[1] See a table of the white and the negro population of voting age in 1860, given by Roscoe Conkling in a speech in the House of Representatives, January 22, 1866. Globe, First Session, Thirty-ninth Congress, p. 357. Taking the census of 1860 as a basis and computing the number of whites and negroes at the ratio of increase reported in the census of 1870, the number of negro males over 20 years of age in the former slave-holding States in 1865 was 1,230,967; in the North (free States), 63,731. The number of white males over 20 years of age in the South was 2,400,262; in the North, 5,403,937.

frage. True, hostility had raged during the slaveholding period, but this was not yet so remote as seriously to change opinion on the subject, either North or South. The abolition of slavery suddenly necessitated a change in public sentiment. The Southern States did not hesitate, even now, while under military rule, to protest against the suggestion of negro suffrage, and several had ratified the Thirteenth Amendment, with the understanding, on their part, that its second clause which gives authority for its enforcement should not be construed as empowering Congress to extend the elective franchise to the negro. The South had always insisted that slavery was a domestic institution, and it now insisted that the political status of the freedmen was to be fixed by each State for itself. This claim of right was historical and founded on sound and ample legal authority; for no principle was better established than the right of each Commonwealth to prescribe the qualifications of its electors.

In abolishing slavery, the people of the Southern States, yielding to necessity, had not modified their estimate of the negro. They now expressed themselves willing to tolerate him as a free man, and to give him the right to be a witness in cases to which he was a party, but the value of his testimony should be determined by the court; they were willing to allow negroes to make contracts for services, and, generally, to have all the legal protection accorded to whites. This is evident from the laws enacted by their legislatures at this time. In thus granting the negro civil rights the South felt that it was doing all that it could do for him. It did not offer to educate him, for it felt too poor to establish separate negro schools; and the thought of the co-education of blacks and whites was intolerable. "The North had freed the negro, let it educate him." The South was worse than exhausted; it was bank-

rupt and its condition deplorable. War had scattered, consumed or destroyed personal property, and had damaged real estate almost beyond the power of restoration. Excluding slaves, the people of the South, within five years, had lost in property, in funds and by the increase of indebtedness, nearly three thousand millions of dollars. They were owing the merchants of the North for goods purchased and money borrowed, four hundred and eight millions more. Their indebtedness exceeded by nearly fourteen hundred millions the assessed value of all property in the Confederate States in 1865, and was more than two hundred millions greater than the national debt at its highest point. The war left them without money, or credit, and almost without the means of subsistence. Long before the war closed, the National Government was distributing millions of dollars to feed, clothe and shelter destitute Southerners of both races.[1]

But poverty and the disorganization of industry did not disturb the southern people as did the prospect of negro suffrage. They could endure poverty and hardship, but negro domination,—never. It was easy, they said, for the North, where there were eighty-four white men to one negro, to talk about equal political rights; but what would the North do if two-fifths of its population were African, and every third man a negro old enough to vote? Even more, what would any seven States of the North do if

[1] The total loss by the rebellion in property, assets and debts, State and Confederate, can never be known. Many estimates have been made, one of which is as follows: Total loss, $5,262,303,554.26; loss excluding slaves was $2,976,145,955.90. In 1865 the Freedmen's Bureau expended for reliefs and education $13,230,277.40. The Confederate debt on the 1st of April, 1865, was estimated at $2,345,297,823, as reported by William W. Belknap, Secretary of War, February 7, 1872. See report of Job E. Stevenson of Ohio on the Finances of the Insurrectionary States, Washington Government Printing Office, 1872, pp. 115-119.

their population were divided between the two races, as was that of the Gulf States?

It is not strange that from the time of the abolition of slavery should date that racial hostility in the South which continues to the present hour. The southern slaveholders had been the most merciful the world had ever known. Cruelty to the slave had been the exception. To judge the South by its slave code is as unjust, as to judge the North solely by its criminal laws. The Thirteenth Amendment practically abolished the slave code and at the same time obliterated much of the old patriarchal feeling of the white race toward the black. The negro was henceforth looked upon as a confederate of that northern power which had changed his condition. He was an enemy within the household, and was soon made to bear all the pains and penalties of his new condition. The conflict of races had begun and a new question had suddenly arisen. What was to be done with the freedmen?

With this conflict began that counter revolution, which followed the civil war and which raised new problems, the mode difficult to solve, on account of the form and dual nature of our government. Complaints of the abuse of freedmen reached Congress from all parts of the South. They were denied the equal protection of the laws; they were not allowed to make contracts, or, making them, were denied their wages, or their portion of the crops. They were terrorized by marauders, were robbed, maltreated and brutally murdered; they were excluded from the basis of representation; they had neither their former protection as slaves, nor the rights of freedmen; their condition was anomalous.

But how should these wrongs be righted and by what authority? Had the National Government the right to address itself to the freedmen as individuals and protect

them, or could this be done only by the State? Who should legislate on their behalf, and what kind of laws should be made? The Southern States had ratified the thirteenth amendment with the understanding that their action fully restored them to Federal relations. They elected full lists of State and local officers, and also Senators and Representatives and claimed that to complete the restoration of Federal relations there was needed only the admission of their delegates by Congress. As to the freedmen, their judgment was fixed and unanimous; each State of itself should pass such laws concerning them as it thought expedient.

These opinions were not limited to the South. The President, in his message to Congress, in December, entertained, and elaborated them.[1] The sovereignty of the States, he said, was the language of the Confederacy, not of the national Constitution. The Government of the United States and of every State was limited. The States, with a proper limitation of their power, were essential to the existence of the Constitution; its perpetuity was theirs. The first question which had presented itself for his decision, was whether the territory within the lately rebellious States should be held as conquered soil, under military authority emanating from the President. But military governments, established for an indefinite period, would offer no security for the suppression of discontent; would divide the people into vanquishers and vanquished, and would incite hatred, rather than restore affection between the sections.

To avoid immeasurable evils, which must follow military governments at the South, the President said that he had "gradually and quickly, and by almost imperceptible

[1] Johnson's first Annual Message, December 4, 1865. Richardson's Messages and Papers of the Presidents, VI, 353-361.

tible steps, sought to restore the rightful energy to the government and to the States." To this end provisional governors had been appointed, conventions called, legislatures assembled, and Senators and Representatives chosen. The United States Courts, so far as possible, had been reappointed; the blockade removed, and the administration of the General Government, in all departments, resumed over the South. This policy had been attended with great risk, but it was one that had to be taken in order to enable the States to resume their functions in the Union. In order to restore Federal relations, the States had been invited "to participate in the higher office of amending the Constitution." They had been told that adoption of the Thirteenth Amendment would put an end to doubt, jealousy and uncertainty "by making us once more a united people." Having ratified the amendment, the States should be permitted to resume their places in the two branches of the national legislature, making the work of restoration complete. But the Senate and the Houses were judges of the election, the returns, and the qualifications of their own members.

The Constitution, as interpreted by its authors and contemporaries, continued the message, and the recent acts of Congress, clearly recognized the right of each State to determine the qualifications of electors, thus precluding any attempt on the part of the President to make the freedmen voters. Such an act must apply to all colored men, North and South, and would create a new class of voters, under an assumption of power, by the President, which neither the Constitution nor the laws of the United States warranted. Let each State decide on this measure for itself. The time was not opportune for a social change so sudden and radical. But though the General Government had not the power to extend the elective franchise

in the States, it was incumbent upon it to protect the freedmen in their liberty, property and industrial rights. The law of labor by contract must take the place of the law of slavery. The States would best promote the public interest by themselves providing adequate protection and remedies for the freedmen. In his view of public law, the President had the Constitution, and the laws, precedents and practices of the government, State and national, on his side. But a new problem had arisen, involving the treatment, the rights and privileges of the freedmen, and, in its solution, the precedents and former practices of the slaveholding States were of little value. The political policy necessitated by the new order of things was oppressive.

Though the amendment nullified the slave codes, yet, a cruel discrimination against the freedmen was practiced all over the South. This was inevitable. Laws do not make public opinion; they are the product of industrial and social conditions. The language of the acts for the protection of the freedmen, passed by Southern legislatures during the two years following the war, gives scarcely a hint of the hostility and discrimination against the African race. These acts, of which those of South Carolina, Kentucky and Tennessee, may be taken as types, gave the freedmen equal rights with the whites to make contracts, to accumulate and inherit property, and to testify in court, and, with few exceptions,[1] subjected the two

[1] See the Acts of Kentucky, February 16, 1866; South Carolina, September 21, 1866, and Arkansas, February 16, 1867, on the right of freedmen to make contracts. The Act of Alabama, December 9, 1865; Kentucky, February 14, 1866; Tennessee, May 26, 1866, and the Maryland Penal Law of 1866, Section 680, conferring civil rights and the right to give testimony in negro cases. See the Act respecting vagrants in Virginia, January 15, 1866, and the Maryland Penal Act of December 18, 1866, and the Code of

races to the same pains and punishments for crimes. Taken as a body of legislation, they appeared to be liberal and humane. True, they treated the negro as a member of a distinct and inferior race. Whatsoever provision they made for his education, or for his comfort in hospitals or asylums, was made, as far as possible, with funds raised by a separate tax, levied upon him and expended solely for his benefit.[1] The acts were not numerous, but, in their racial discriminations plainly indicated the way in which legislation would be directed throughout the South. But it must be remembered that laws discriminating against free negroes had long been in force in the northern States.[2] In 1866 there was not a State in the Union in which a negro stood on perfect equality with a white man.

This wall of discrimination was now about to be razed to the ground; its demolition dictated by the necessities of the country, not by the wishes of the white population. Wherever there were fewest negroes, the demand for the

1867, Section 3630. See Arkansas Act of February 6, 1867, giving the same rights as to whites except those of serving on juries, in the militia and voting; all of which may be taken as types applying to the blacks and whites alike.

[1] The Kentucky Act, February 16, 1866, provided for a poll-tax of $2.00 on negroes; one-half of the funds thus raised to be expended for the education of negroes, the other half for the care of negro paupers. See also the Act of March 9, 1867, which provided for the support of negro schools in each county. See the North Carolina Act of 1869 for the support of schools; Arkansas Act, July 25, 1868, for the same. This modified the Act of March 18, 1867, which had established a system of education for whites only. See Georgia Act, December 16, 1866, which provided only for free white schools, but the Act of December 13, appropriated $10,000, with which to erect a special building for the care of insane negroes. Maryland, in 1868, established colored schools, to be supported by taxation paid by the colored people.

[2] For an account of this legislation, see my Constitutional History of the American People, 1776-1850, Vol. I, Chap. xii.

obliteration of racial discrimination was strongest.[1] The belief that Congress was responsible for the negro was not limited to the South. Congress itself held it, and embodied its convictions in a civil rights bill, which was presented in the Senate, by Lyman Trumbull of Illinois, on the fifth of January, 1866.[2] On the twenty-ninth, the bill came up in Committee of the Whole, and its author pronounced it the most important measure that had been under the consideration of the Senate since the adoption of the Thirteenth Amendment; that had made all persons free; this was intended to give effect to the amendment by securing practical freedom to all persons within the United States. It was to obliterate all legal discriminations against the negro. What to do with him, said Senator Morrill, how to define him; what he is in American law and to what rights he is entitled was the puzzling and vexatious question.

On the second of February, the bill passed the Senate, and passed the House in an amended form on the thirteenth of March. The Senate agreed to the House amendments, and sent the bill to the President, who, on the twenty-seventh, returned it with a veto message. The bill defined citizens of the United States as "all persons born

[1] Typical of demands of this kind was the second plank in the platform adopted by the Republican State Convention of Vermont, at Montpelier, June 20, 1866, "for exact justice to all persons, irrespective of color or race." The platform is given in the Annual Encyclopaedia for 1866. See also the resolutions of the Vermont Legislature given in the Congressional Globe for December 5, 1866.

[2] See the Globe, p. 129; for a discussion of the measure beginning January 29, see pp. 474-607. It passed the Senate on the 2nd of February, by a vote of 33 to 12; Globe, p. 607; and the House, by a vote of 111 to 34, March 13; Globe, p. 1367. On the 6th of April, the Senate passed it over the veto by a vote of 33 to 15 (Senate Journal, p. 317), and on the 9th, the House passed it over the veto by a vote of 123 to 41; Globe, p. 1861.

there and not subject to any foreign power (excluding Indians not taxed), of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party should have been duly convicted;" these citizens should have the right, in every State and territory, equally with white men, to make and enforce contracts, to sue, to give evidence, to inherit, to purchase, hold and convey real and personal property, and to enjoy the full benefit of all laws; and they should be subject to like pains and punishments, and to none other. The penalty for depriving any person of these rights was fixed at a fine not exceeding one thousand dollars, or imprisonment for not longer than one year, or both, at the discretion of the court. Jurisdiction of offenses under the act was given to the District Circuit Courts of the United States, with right of appeal to the Supreme Court.[1]

The arguments which carried the bill through Congress were essentially the same as those which had carried through the Thirteenth Amendment. The veto message presented most of the arguments advanced against the measure.[2] The definition of citizens, said the President, was too comprehensive, for it included the "Chinese of the Pacific coast, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks." It did not purport to confer any other right of citizenship than Federal citizenship. It gave these classes of persons no status as citizens of States. The power to confer State citizenship belonged as exclusively to the States as the power to confer the right of Federal citizenship belonged to Congress. The bill was an innovation.

[1] Statutes at Large, Vol. XIV, p. 27.

[2] For the veto message, March 27, 1866, see Richardson's Messages and Papers of the Presidents, VI, 405-413.

If all native born Americans were citizens of the United States, by virtue of the Constitution, the bill was unnecessary; if they were not citizens, as might be assumed from the bill itself, the grave question was presented whether, when eleven of the thirty-six States were unrepresented in Congress, it was sound policy to make the entire colored population, and all other excepted classes, United States citizens. Could it be reasonably supposed that males, just emerging from slavery into freedom, possessed the requisite qualifications to entitle them to the privileges and immunities of citizens of the United States? The people of the several States had not expressed such a conviction. It was unnecessary to declare them citizens in order to secure them in the enjoyment of the civil rights which the bill proposed to confer. Domiciled aliens and foreigners already possessed these rights by Federal and State laws, and these were sufficient to give like protection to those for whom the bill provided special legislation. It had always been the policy of the Government to require all persons, who were strangers to our institutions and laws, to pass through a period of probation for the purpose of giving evidence of their fitness to receive, and exercise, the rights of citizens. The bill discriminated against large numbers of intelligent, worthy and patriotic foreigners in favor of the negro, to whom, after long years of bondage, the avenues of freedom had been suddenly opened. He must, of necessity, lack knowledge of the nature and character of our institutions.

The rights which the bill proposed to give the negro in every State and territory were not objectionable, if granted by the proper authority. The bill attempted to establish, by Federal law, a perfect equality between the white and colored races, in every State in the Union,—a plain invasion of the vast field of State jurisdiction.

It would forever preclude the exercise, by any State, of any power of discrimination between the races. Laws North and South forbade marriages between negroes and whites; and the discrimination was an instance of State policy. Had Congress the power to legislate on the internal policy and economy of the States? If it could declare by law who should hold lands, or testify, or make contracts, then by law it could also declare who, without regard to color or race, had the right to sit as judge or jury, or to hold any office, and, finally, to vote in every State and territory. In brief, the whole bill was an invasion of the rights, privileges and immunities of the States. On the sixth of April, by a vote of more than two to one, the bill passed the Senate, notwithstanding the President's objections, and three days later, by a vote of nearly three to one, passed the House.

This great act was the beginning of much legislation on behalf of the colored race. In the supervision of the Freedmen's Bureau, schools for the negroes had been started in many localities in the South, but they at once became objects of hostility and attack from evil disposed whites. Next to food, clothing and employment, the great need of the race was schools. Co-education with the whites was practically impossible. Kentucky boldly took up the solution of the problem and inaugurated a system of separate schools. In July, Congress granted land in the city of Washington for the sole use of schools for colored children in the District of Columbia, the first Federal act of the kind.[1] It indicated the attitude of the Government toward the great educational problem of the century.

In July, by a joint resolution of Congress,[2] Tennessee

[1] July 28, 1866, Statutes at Large, XIV, 343.

[2] Statutes at Large, XIV, 364, July 24, 1866; Globe, April 30, 1866, p. 2282; carried in the Senate, 28 to 4, July 21; Globe, p. 4007; in the House, July 23, 93 to 26; Globe, p. 4056.

was restored to her practical relations to the Union. Though the President signed the resolution, he objected to it as "anomalous, unnecessary and inexpedient." If a resolution of the kind was necessary, as a conditioned precedent to the admission of members of Congress, "it would happen, in the event of a veto by the Executive, that Senators and Representatives could only be admitted to the halls of legislation by a two-thirds vote of each House." The resolution recited that the State had ratified both the thirteenth and fourteenth amendments, but its restoration to the Union could be made only with the consent of Congress.[1] The President thought that the resolution should have been passed and approved before any amendment to the Constitution had been submitted to the Tennessee legislature, otherwise the inference was deducible that while, in the opinion of Congress, the people of the State might be too strongly disloyal to be entitled to representation, nevertheless, during the suspension of their "former proper practical relations to the Union," they might have an equally potent voice with other loyal States in propositions to amend the Constitution. The Thirteenth Amendment had been ratified by Tennessee and by other Southern States, and the political existence of these, and their relations to the Federal Government had been fully recognized and acknowledged by the President. In other words, Tennessee had for eight months been restored to the Union.[2] The President's objections clearly intimated the radical difference between his policy of reconstruction and that of Congress.

[1] Congress had passed the joint resolution proposing the fourteenth amendment, on the 16th of June, and Tennessee had ratified it on the 19th of July. See infra, pp. 300, 301.

[2] See President's message on the joint resolution of restoring Tennessee, July 24, 1866; Richardson's Messages and Papers of the Presidents, VI, 395.

But the spirit of the civil rights bill was dictating other radical legislation. The veto had apprehended the extension of the right of suffrage to the negro by federal law, and Johnson's fears were realized on the eighth of January, when Congress conferred the right to vote on the negroes of the District of Columbia.[1] The bill was bitterly opposed in both Houses, but it passed by overwhelming majorities.[2]

In his veto message, the President marshaled the principal arguments which had been heard against it. The question of negro suffrage in the District, when submitted at a special election in December, had called out a much larger vote than usual, yet only thirty-five ballots had been cast in its favor, in Washington,[3] and only one, in Georgetown;[4] the bill, therefore, entirely disregarded the wishes of the people of the District. Though, by the Constitution, the District was subject to Congress, that body was bound to observe the letter and spirit of the supreme law. No legislature of New York, Pennsylvania, or Indiana would arbitrarily, and against the express will of the majority of the people whom it represented, force the presence of the negro race upon them, as voters, and make them eligible for office without any other qualification than a brief term of residence within the State. New York discriminated between free persons of color and whites, as voters, and Pennsylvania and Indiana excluded them from the right of suffrage. The question was a local one and should be settled by the citizens of the District.

[1] January 8, 1867. Statutes at Large, Vol. XIV, p. 375.

[2] It was introduced by Senator Wade of Ohio, December 4, 1865. Globe, p. 1. Amended and passed the Senate, December 13, 32 to 13, and passed the House, December 14, by 127 to 46.

[3] 6,521 against and 35 for negro suffrage.

[4] 812 against and 1 for the extension.

True, Massachusetts allowed male persons to vote without regard to color, provided they were qualified by sufficient intelligence, but out of a population of a million and a quarter[1] that State had less than ten thousand persons of color,[2] and, of these, only twenty-six hundred were old enough to vote, as against three hundred and forty thousand white men.[3] In the District of Columbia, nearly one-third of the population were negroes.[4] Clothe them with the elective franchise, and their numbers would soon be increased by an influx from adjoining States. The District was already embarrassed by the presence of a large class of idle persons, whom, to admit them to the right to vote would make subservient to the purposes of designing men. The negroes were a nomadic people. Finding that their residence in the District would give them elective privileges, they would soon pour in, in such numbers as to secure supreme control over the white race, governing it by their own officers and taxing property in which they had no interest. In Massachusetts, the negro enjoyed the benefits of a thorough educational system, and must be able to read[5] in order to vote. This bill extended the right to vote to all negroes without discrimination, simply requiring a year's residence. "Imposed upon an unwilling people, who were placed by the Constitution under the exclusive legislation of Congress, it would be viewed by the country as an arbitrary exer-

[1] 1,231,066 in 1860.

[2] 9,602.

[3] 339,086 white and 2,602 colored.

[4] 60,764 white to 14,316 persons of color of the census of 1860, but in 1867 the President estimated that there were 100,000 whites to 30,000 negroes.

[5] By the amendment to the Constitution, Article 20, ratified in 1857, which provided that "No person shall have a right to vote or be eligible to office * * * who shall not be able to read the Constitution in the English language and write his name."

cise of power, and an indication of the purpose of Congress to compel the acceptance of negro suffrage by the States." The measure was bound to engender hostile feelings between the two races. Extension of the suffrage to the negroes of the District was not necessary to enable them to protect either their interests or their rights. They stood in the District precisely as they stood in Pennsylvania, Ohio and Indiana; and under the recent civil rights law, possessed rights, for the security of persons and property, enjoyed by white citizens. To admit a new class of voters, not properly qualified, could only weaken a system of government instead of adding to its strength and durability. The President disapproved the bill upon local considerations and because it was "the beginning of an experiment on a larger scale."[1] On the seventh, the Senate, and on the eighth, the House,[2] passed the bill over the veto.

The policy of Congress now, for extending the franchise to negroes, was like its policy for the abolition of slavery the year before. The abolition of slavery in the District of Columbia, and in the territories, had been the prelude to the joint resolution that became the thirteenth amendment. So now the extension of the elective franchise to negroes in the District of Columbia was soon followed by an act declaring that, in the territories of the United States thereafter organized, the right to vote should not be denied on account of race, color or previous condition of servitude.[3] It became a law without the approval of the President.

[1] Veto measure, January 5, 1867, Richardson, Vol. VI, pp. 472-483.

[2] The Senate by a vote of 29 to 10 (Journal, p. 74); the House by 112 to 38 (Journal, p. 133).

[3] Act of January 25, 1867; Statute at Large, Vol. XIV, pp. 379-380.

The extension of the suffrage under the act was not suffered to await the organization of new territories. The people of Nebraska had already been empowered to form a constitution and State government.[1] In February, 1866, the territorial legislature by joint resolution, submitted a constitution for their approval, and it was ratified by a few votes.[2] It limited the elective franchise

1 Act of April 19, 1864; Statutes at Large, Vol. XIII, p. 47.

2 Constitution of the State of Nebraska (Seal, Popular Sovereignty, the Constitution, Progress). Joint resolution submitting the Constitution for a State government to the people for their approval or rejection. At the Capitol, February, 1866. Nebraska Republican Job Office: 1866, 16 pages. The following letter throws light on the first Constitution of Nebraska:

Omaha, Neb., April 18, 1867.—Judge J. A. Jameson: Dear Sir—After considerable trouble, I have the facts collected about the formation of the constitution of the State of Nebraska. The friends of the State movement met at the Republican Office at Omaha. After duly calling the meeting to order, a chairman elected, the question was fully discussed, and it was decided that some movement should be made for a State. At an adjourned meeting a few days later, the friendly members of the Legislature being present, it was carried that the chairman appoint a committee of nine (three from the Council and six from the House of Representatives) to draft a constitution and present the same to the Legislature. This committee for the State met evenings at the office of Estabrook and Sahler and commenced their labors. After working evenings for six nights, the constitution as printed (i. e., by the Republican Job Office, above) was ready for presentation to the Legislature; accordingly, Mr. Porter, a member of the Council (and chairman of the committee), on February 3, 1866, gave notice of the constitution and the joint resolution. February 5, Mr. Porter introduced the constitution and joint resolution—read first time. Mr. Bennett moved to suspend (the) rules; (to) read by its title second time, and refer to a special committee of three. Carried. February 5, 1866, the special committee, by Mr. Bennett, its chairman, reported the bill and joint resolution without amendment and asked its passage. On motion, the rules were suspended and the report considered. On motion, the bill and joint resolution read the third time and put on its passage; the yeas 6, nays 6. The President voting aye, the bill passed and title agreed to. House, February 6, 1866.

to white persons. Congress now added, as a condition to the former enabling act, that Nebraska should not be admitted until, within the State, there should be no denial of the elective franchise, nor of any other right, to any person, on account of race or color, excepting Indians not taxed; and, furthermore, that its legislature, by a solemn public act, should declare its assent to these conditions; this should be transmitted to the President, who upon its receipt, should announce that the condition had become a part of the organic law of the State, and thereupon its admission into the Union should be considered as complete.[1]

Johnson returned the bill to the Senate with a veto message. The conditions imposed by the act, he said, were not contemplated at the time when the inhabitants of

The chief clerk of Council, with message from Council, informed the House that Council had passed Council Bill 22, being joint resolution and constitution for State government—read the first time. February 7, 1866, read the second time. February 8, 1866, read the third time and put on its passage; yeas 22, noes 1. Council, February 9, 1866, message from the Governor that he had signed joint resolution and bill for State Constitution. On January 2, 1866, constitution submitted to the people and carried by 145 (?) majority. JOHN H. SAHLER.

Extract from a manuscript letter to Judge Jameson from Judge C. Powell, Omaha, July 16, 1866: "It is held that there was great fraud committed on the part of the Republicans, and I think it is admitted by the better portion of that party. I am not partisan and have never taken any part in politics since the breaking up of the old Whig party, consequently I can say and think what I believe, and it is my opinion that both parties are as dishonest as can be, and that the Republicans got a little ahead of their opponents." Accompanying this letter is a manuscript account of the organization of the Territory and of the proceedings of the Legislature on the constitution. It estimates the popular majority in its favor at 100.

[1] February 9, 1867: Statutes at Large, Vol. XIV, pp. 391-392. The bill passed the Senate, 23 to 11, January 10, 1867 (Journal, p. 84). Was amended in the House and passed there, January 15, by a vote of 103 to 55. (Journal, p. 174.)

Nebraska had asked admission, and was in striking conflict with the constitution which they had adopted.[1] Congress was undertaking to authorize and compel a legislature to change a constitution which had received the sanction of the people and which Congress itself accepted and confirmed; nor was this the only incongruity of the bill. While purporting to admit Nebraska into the Union upon an equal footing with the original States, it demanded the acceptance of a condition to admission which had never been asked of any people when presenting a constitution of State government. This condition,—the extension of the franchise,—was clearly in violation of the federal Constitution, under the provisions of which, from the foundation of the government, each State had been left free to determine for itself the qualification of its electors. It would be more in accord with the principle of our government to allow the people of Nebraska, by popular vote or, by convention, chosen by themselves, to declare whether or not they would accept the terms upon which it was proposed to admit them into the Union. It was well known that the proceedings attending the formation of the constitution of Nebraska were not in conformity with the provisions of the enabling act. In an aggregate vote of nearly eight thousand, the majority in favor of the constitution had not exceeded one hundred,[2] and it was alleged that, in consequence of frauds, even this result could not be received as a fair expression of the wishes of the people. They were not numerous enough to bear the burden of a State government and could therefore "wisely and patiently afford to wait."[3] On the ninth

[1] Nebraska Constitution, 1866, Article II, Section 2, limiting the right to vote to white male citizens.

[2] The aggregate vote was 7,776.

[3] Nebraska veto message, January 29, 1867. Richardson, Vol. VI, pp. 489-492.

of February, the bill was passed over the President's veto by a large majority in both Houses.[1]

The admission of Nebraska was strikingly like that of Missouri, forty-six years before. In their original constitutions both territories had discriminated against the colored race. The Free Soil party of 1820, taking a firm stand against the extension of slavery, had insisted that the clause in the Missouri constitution of 1820 discriminating between free persons of color, should be declared null and void by a solemn act of the legislature, and that this act should be a fundamental condition of the admission of the State into the Union. The condition was complied with and the State admitted by a proclamation of President Monroe.[2] Another Free Soil party, the Republican, dedicated to the abolition of slavery and the extension of civil rights and the suffrage to the negro race, now dictated a condition of admission to Nebraska, the substance of which was the obliteration of all discrimination among electors on account of race of color. The Nebraska legislature, by a solemn public act, complied with the condition, and on the first of March, the State was admitted by proclamation of the President.[3] On the second of March, the principle of the Nebraska act was

[1] In the Senate, 31 to 9. (Journal, p. 228.) In the House, 120 to 44. (Journal, p. 354.)

[2] Proclamation of August 10, 1821. Richardson's Messages and Papers of the Presidents, II, 95. For an account of the admission of Missouri, see the Constitutional History of the American People, 1776-1850, Vol. I, Chap. x.

[3] The Nebraska Legislature convened on the 20th of February for the express purpose of complying with the condition. The President's proclamation is given in Richardson, Vol. XI, p. 516. It was generally believed at the time that the admission of the State was accelerated by the desire of the Republican party to have an additional Republican State in the Union, thereby strengthening the reconstruction policy of the party, and espe-

further complied with in an act regulating the territory of Montana in which thenceforth there should be no discrimination made in the elective franchise on account of race or color.[1]

While these radical changes in our political organization were taking the form of national laws, Congress was also engaged in discussing an amendment to the Constitution which should make them permanent. The problems of reconstruction were bewildering both in principle and in variety. It was soon realized that, to solve them rationally and systematically, some uniform policy must be followed. This conclusion was both necessary and wise, and resulted in the appointment of a Joint Committee of Reconstruction, consisting of six members of the Senate and nine of the House.[2]

Amendments to the Constitution involving the issues of reconstruction were proposed in both Houses, some before, some after the appointment of this committee. These

cially in the adoption and ratification of the fourteenth amendment. In this respect Nebraska bore to that policy and amendment much the same relation that West Virginia and Nevada, admitted under similar political tactics and purposes, bore to the policy of abolition and the thirteenth amendment.

[1] Statutes at Large, XIV, 426.

[2] The joint resolution for the appointment of such a committee passed the House December 4, 1865, by a vote of 133 to 36, and the Senate, December 12, by a vote of 33 to 11. The Senate resolution was agreed to by the House on the 13th. The confreres from the House were Thaddeus Stevens of Pennsylvania, Elihu B. Washburne of Illinois, Justin S. Morrill of Vermont, Henry Grider of Kentucky, John A. Bingham of Ohio, Roscoe Conkling of New York, George S. Boutwell of Massachusetts, Henry T. Blow of Missouri and Andrew J. Rogers of New Jersey. Those from the Senate were William Pitt Fessenden of Maine, James W. Grimes of Iowa, Ira Harris of New York, Jacob M. Howard of Michigan, Reverdy Johnson of Maryland and George H. Williams of Oregon. Congressional Globe, First Session, Thirty-Ninth Congress, 1865-1866, pp. 24-57. Senate Journal, p. 59.

issues were the extension of the franchise to the freedmen; the repudiation of the rebel debt; a change in the basis of representation, and the ineligibility of adherents of the Confederacy to hold office. All the proposed amendments affecting these issues, separately or in combination, were ultimately postponed, or abandoned, and the amendment reported by the Joint Committee, which combined the essentials of all that had received support, finally, took the form of a joint resolution and became the Fourteenth Amendment sent out to the States for ratification.

It was the thirtieth of April when Thaddeus Stevens, chairman of the Joint Committee in the House, presented its resolution. It consisted of four propositions; the first was a limitation on the States, enjoining them from making, or enforcing, any law abridging the privileges, or immunities, of citizens of the United States; or depriving any person of life, liberty or property without due process of law; or denying to any, within their jurisdiction, the equal protection of the law. The second changed the basis of the apportionment of representation, by including all persons, excepting Indians not taxed. If a State denied the elective franchise to any male citizen, otherwise qualified, or in any way abridged it, except for participation in rebellion, or for other crimes, its basis of representation should be proportionately reduced. The third excluded from the right to vote for members of Congress or for Presidential electors,—until the fourth day of July, 1870,—all persons who voluntarily had adhered to the late insurrection, giving it aid and comfort. The fourth repudiated the Confederate debt and all claims for the loss of slaves.[1]

[1] This was H. R. No. 127, Globe, p, 2286, and reads as follows: Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

That the first proposition, forbidding the States to abridge the privileges of citizens of the United States was necessary, said Bingham, was demonstrated by the history of the last four years. There was needed, in the Constitution, a positive declaration of the power in the whole people of the United States to protect, by national law, the privileges and immunities of all the citizens of the republic and the inborn rights of every person within its jurisdiction, whenever these should be abridged or denied by the unconstitutional acts of any State.

The amendment took from no State any right that had ever pertained to it. None ever had the right, under the forms of law, or otherwise, to deny to any freedman the

States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than 21 years of age, or in any way abridge, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than 21 years of age.

Section 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for representatives in Congress and for electors for President and Vice-President of the United States.

Section 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

equal protection of the laws, or to abridge the privileges or immunities of any citizen of the United States, although many had assumed and exercised the power, and that without remedy. The amendment did not give to Congress power to regulate the suffrage in the States. The second proposition in the amendment was evidence that the suffrage was not the subject of Congressional law. The amendment would afford a direct remedy "for a case supposed by Madison, where treason might change a State government from republican to despotic and thereby deny suffrage to the people." Many instances of State injustice and oppression had occurred by which the privileges of citizens of the United States, guaranteed by the Constitution, had been flagrantly violated and the national government had been unable to afford any remedy at law. The right of the citizens of each State to all the privileges and immunities of citizens in the several States included, among others, the right to bear true allegiance to the national government and to be protected in life, liberty and property. "Next to the allegiance which we owe to God, our Creator, is the allegiance which we owe to our common country."

There had been a time, in our history, when the State of South Carolina, by solemn ordinance, had ordained, as a part of its fundamental law, that its citizens should abjure their allegiance to every other government or authority.[1] Out of the spirit of this ordinance had grown nullification and secession. Patriotic men had "looked in vain for any grant of power under the Constitution, by which to give protection to the citizens of the United

[1] See Reports and Ordinances of the Convention of the People of South Carolina, adopted at its session in March, 1833. Columbia, 1833.

States, residents in South Carolina, against the infamous provisions of the ordinance, which required them to abjure the allegiance which they owed their country." Was it not a disgrace to the republic that, for fidelity to the United States, men could not be protected by national law against degrading punishments, inflicted on slaves and felons by State laws. The second proposition provided for the equalization of representation among all the citizens of the Union, without discrimination. If this amendment was ratified, and New York, with her colored population of fifty thousand, should discriminate against them, as to the elective franchise, except in cases of crime, she to that extent would lose her representative power in Congress.

On the third proposition, the disqualification of certain voters until 1870, the defenders of the resolution were greatly divided. Some, like Thaddeus Stevens, would disqualify them forever. Of the authority of the people of the United States to disfranchise all lately in rebellion, there was no doubt. If Congress had power to disfranchise rebels for life, from holding office under the United States, as a bill to that effect at this time before Congress proved,[1] it could take from them the right to vote until 1870 as well by law as by constitutional amendment. The question was not one of power, but of policy. The letter and intention of the Constitution was clear, that the certificate of election of Presidential electors, under the great seal of the State, was final and conclusive evidence to Congress, except when the certificate showed that the electors had been appointed on some other day than that fixed by law. Congress could not go behind the certificates, nor

[1] This was the reconstruction bill which, amended, became the act of March 2, 1867; Statutes at Large, XIV, 428-430. It was under discussion at this time.

could the two Houses separately, or in joint convention, investigate the question. "The appointment of electors for President and Vice-President is the act of a State, not of individuals." On this point the Constitution was explicit, therefore, unless the provision in the Constitution that "each State shall appoint the electors in such manner as the legislature thereof shall direct," was changed, the proposed amendment would be of no avail. The new amendment would not disqualify any supporter of the rebellion from voting at elections for State officers, nor from being appointed a presidential elector; therefore, as the supporters of the late rebellion were largely in the majority in every insurrectionary State, they could elect a State legislature, which, from anything in the amendment, might appoint rebels as presidential electors. Other amendments to the Constitution might be required to enforce this one.

The proposition, to repudiate the Confederate debt and forbid compensation for slaves, involved the future fidelity of the Nation. "It was a declaration, in solemn form, that the resources of this great country should be used, in the future, to maintain inviolate the plighted faith of the Nation to its dead and its living defenders.[1]

But there were many who opposed the amendment and none more ably than Samuel J. Randall of Pennsylvania. Its first proposition, he said, violated the policy of discrimination, which heretofore had been exclusively exercised by the States and which should continue; it related to State citizenship. There was no occasion whatever for the exercise of federal power at variance with the wishes of the people of the States respecting the two races. It would be well if the colored race could be placed in the

[1] Congressional Globe, May 10, 1866, pp. 2541-2544.

same political condition as in Pennsylvania,[1] but this matter of the elective franchise should be left to the States themselves. If the United States had the right to interfere in behalf of one group of rights, and of all, indeed, save the suffrage, how long would it be before Congress would be tearing down every barrier? It was only fear of the people that restrained Congress, now, from adopting this amendment, and the privilege of determining who should vote within the States would soon be assumed by that body. Clearly it was only the timidity of the party in power that restrained it from ingrafting negro suffrage upon the Constitution and forcing it upon the people.

The second proposition was ambiguous. Did it mean that males over twenty-one years of age, not allowed to vote, should not be counted in the basis of representation, or, that the diminution of representation was to be in the proportion they bore to the voters? In either case, representation might wholly be denied, or greatly abridged.

[1] The constitution of 1838 (Article III, Section 1) limited the elective franchise to white freemen. The constitution of 1776 (Section VI) gave freemen the right to vote without discrimination of race or color, as did that of 1790. (Article III, Section 1.) The committee that reported the article on the elective franchise in the constitution of 1790 limited the right to vote to white male citizens. "Albert Gallatin, who was a member of that convention, thought that the word 'white' was too indefinite; that it might exclude him from the rights of a voter." Gallatin's complexion was dark enough to cause him to object to the discriminating word "white." Debates, Pennsylvania Convention, 1838, Vol. III, p. 87. This interesting situation is not verified by the minutes of the convention of 1789-1790. See its proceedings, 1825, pp. 158, 199, 200, 253. The question of the extension of the right to vote to free persons of color was discussed at great length in the convention of 1838; see Vol. II, pp. 470-560; Vol. III, pp. 82-134. The question in 1838 was of interest because the insertion of the word "white" disfranchised free persons of color who had voted under the constitution of 1789.

The proposition would make an entire change in the basis of representation "which should in every country rest upon the inhabitants." There was the less need of change because a large portion of the people, with whom the North hoped to live for all time on terms of peace and equity, were not present in Congress to give their views and to consider the effect this legislation would have upon their interests.

The injustice and evident purpose of the third proposition was admitted even by its supporters; it was intended to secure what the party in power most wished—an entire disagreement to the whole scheme by the eleven Southern States and their exclusion from representation in Congress, indefinitely. The whole resolution was a "plan of disunion, and it was a deception to call it otherwise." The friends of the Union, whatever their name, must cooperate to defeat the measure, or the Union would be sundered. It would be destroyed by those who "arrogated to themselves to be its especial defenders." The President had steadily pursued the policy marked out by Lincoln. He had brought the country safely along, until now. All that was required, to complete and make the Union perfect, was to admit to Congress the loyal representatives from the late rebel States. Their ordinances of secession were null and void; they were in the Union; they had never been out, and they were entitled legally to representation. Whenever the people in any of them elected Union men of undoubted loyalty, it was the duty of Congress to admit them. Those who were permanently identified with the Confederacy and who now claimed seats in Congress from Southern States, "should be immediately rejected and their constituents requested to elect Union men in their places. The proposed amendment involved the whole issue of reconstruction. No

real or hearty peace could come from its adoption. "Let us leave the war path," concluded Randall, "and return to the ways of friendship and peace."[1]

The debate on amendments, some of which had been adopted by the House before the appointment of the grand Committee on Reconstruction, had gone over the ground so thoroughly that its joint resolution was passed almost by an immediate vote. Garfield wished to amend it so as forever to exclude from any office of trust or profit under the government of the United States, all persons who had voluntarily adhered to the Southern Confederacy, or given it aid or comfort,[2] but by a vote of one hundred and twenty-eight to thirty-seven, the House passed the resolution as it was reported.[3]

Among the greatly distinguished men who supported it were James A. Garfield and Rutherford B. Hayes, destined to be chosen Presidents of the United States; George W. Julian, the standard bearer of free soil, who had voted for the Thirteenth Amendment and now cast his vote for the Fourteenth; Boutwell and Washburn, Windom, Cullom and Colfax; Thaddeus Stevens, whose withering sarcasm and impassioned speech was soon to be heard in impeachment of the President, the leader of his party in the House, and whose vehement advocacy of the resolution had almost given it his name; and James G. Blaine and Roscoe Conkling, for whom the years held copious stores of strife, contest and disappointment. Most distinguished of the thirty-seven who recorded their votes against the resolution was Samuel J. Randall, who was destined to succeed (save for the brief speakership of Michael C. Kerr, who now also voted against the measure) James G. Blaine

1 Globe, May 10, 1866, pp. 2530-2531.
2 Globe, p. 2545.
3 The resolution passed the House, May 10.

as Speaker of the House, and there to share with him and Henry Clay the reputation of being one of the greatest of parliamentarians.[1]

Two weeks passed before the Senate began the discussion of the House resolution.[2] The House, on the thirty-first of January, had passed a joint resolution which originated with James G. Blaine, amending the Constitution with respect to the basis of representation in Congress, and it had been discussed at great length in the Senate,[3] but it was dropped when the resolution from the Joint Committee on Reconstruction came up. This was not reached until the twenty-ninth of May, though, since it had been reported, several other amendments had been proposed.[4] On the twenty-ninth of May Senator Howard brought forward several amendments which ultimately identified him so closely with the Fourteenth as to give it his name. On that day, the section of the resolution excluding certain persons from the right to vote until the fourth of July, 1870, was stricken out without

[1] Mr. Blaine was Speaker of the House from March 4, 1869, to March 3, 1875. From December 6, 1875, to August 18, 1876, the Speakership was filled by Michael C. Kerr of Indiana; he voted against the amendment.

[2] May 24, Globe, p. 2798.

[3] Introduced by Mr. Blaine, July 8, 1866, Globe, p. 136. Adopted, 120 to 46, p. 538. Discussed in the Senate, pp. 520, 1321.

[4] On the 24th of May, Globe, p. 2804. Senator Grimes proposed his amendment to strike out sections 2 and 3, and insert: (2) Representation shall be apportioned among the several States which may be included within this Union according to the number in such State of male citizens of the United States over 21 years of age, qualified by the laws of the State to choose members to the most numerous branch of its Legislature, excluding such citizens as are disqualified for participating in the rebellion. (3) Direct taxes shall be apportioned among the several States according to the value of the real and personal taxable property situated in each State not belonging to the State or to the United States.

opposition.[1] Howard's substitutes for the joint resolution were, first, a definition of United States citizens;[2] secondly, a definition of who are qualified to hold office in the United States or in a State,[3] and, thirdly, a declaration of the inviolability of the national debt.[4] These amendments were the result of much deliberation in caucus and were submitted as the opinion of the Republican Senators.

The language of the first Howard amendment was taken from the opening section of the civil rights law and its history was another illustration of the source of many clauses in American constitutions. He offered it, he said, simply as declaratory of the law of the land. It would settle the great question of citizenship, and remove all doubt as to what persons were, or were not, citizens of

[1] 43 yeas, 6 absent.

[2] All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. It was to amend Section 1. Globe, p. 2869.

[3] His second amendment becoming the third of the resolution was "No person shall be a Senator or Representative in Congress or an elector of President or Vice-President, or hold any office, civil or military, under the United States or under any State, who having previously taken an oath, as member of Congress or as officer of the United States or as member of any State Legislature or as executive or judiciary officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof; but Congress may by a vote of two-thirds of each House remove such a liability. Ib.

[4] It was to come in as Section 4. The obligations of the United States incurred in suppression of insurrection, in defence of the Union, or for payment of bounties or pensions incident thereto shall remain inviolate. Ib. He also proposed some verbal amendments, including the declaration that all debts, obligations and claims of the Confederacy should be forever held illegal and void.

the United States; a definition long desired in the jurisprudence and legislation of the country. But was it to include the Indians? Would it not be well, inquired Senator Doolittle of Wisconsin, specifically to exclude all Indians not taxed? It was replied that they were not born subject to the jurisdiction of the United States, but, in our legislation and jurisprudence had always been regarded as *quasi* foreigners. The mere fact of birth in this country did not entitle a man to the right to vote; that privilege was conferred by the State; but was it not essential to the existence of a free State that it should have the power not only to declare who should exercise political privileges within its boundaries, but if in danger of being overrun by another and different race, also absolutely to expel obnoxious persons?

Were the people of California to remain inactive while they were overrun by a flood of Mongolians? Perhaps the contingency would never happen. As the Constitution stood, the General Government had the right to forbid, if it deemed proper, the entrance into its territory of any person not a citizen of one of the States. Certainly the people of a Commonwealth should have the right to exclude men of a different race, of a different religion, of different manners, traditions and sympathies. The Mongolian race, numbering unknown millions, might pour a human flood upon our Pacific coast and, in a very short time, change the character of its institutions.[1]

But, it was asked, was not the fear of Chinese invasion unreasonable? Was it not quite improbable that the race would ever become numerous on our coasts? California had passed restrictive statutes as to the Chinese, but its Supreme Court had repeatedly declared them unconstitutional, a conclusion which, in the light of the civil

[1] Senator Cowan. Globe, p. 2891.

rights law, was thought by many to be eminently just.[1] But the large mass of Indian population presented a much more serious difficulty. Was it not both inexpedient and violative of our political traditions to apply the term citizens to them? Many of the Indians, especially the wild tribes, were not subject to the jurisdiction of the United States, and could not come within the amendment; but Indians who were taxed were entitled to its protection.[2] The question was one of jurisdiction. The civil rights law declared that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, were citizens. The definition was explicit and comprehensive and the resolution should be amended accordingly. The truth was, that Indians were subjects, not citizens of the United States.[3] Did Congress propose to make the wild Indians of the desert citizens? If a State taxed the Indians within its limits, would that make them citizens? Jurisdiction went with taxation. Wisconsin gave civilized Indians the right to vote at this time,[4] but such Indians were taxed and had severed their tribal relations. Senator Doolittle's amendment, excluding Indians not taxed, was rejected, but the first Howard amendment was agreed to.

With equal unanimity the second amendment, whose object, as Fessenden explained, was "to prevent a State from saying that although a person is a citizen of the United States he is not a citizen of the State," was

1 Mr. Howard. Globe, p. 2892.

2 Senator Wade. Globe, p. 2893.

3 Mr. Hendricks, Globe, p. 2895, citing the opinion of Attorney-General Cushing, July 5, 1856.

4 Wisconsin gave the suffrage to persons of Indian birth, who had since been declared by law and Congress to be citizens of the United States, and to civilized persons of Indian descent not members of any tribe. Constitution of 1848, Article III, Section 1.

adopted. Reverdy Johnson, of Maryland, objected to the provision in the amendment which excluded from eligibility to office, because it went too far. At the conclusion of the Civil War, milder measures, he said, were better adapted for the restoration of peace and harmony. The effect of the amendment would be to disfranchise nine-tenths of the white men of the South, until Congress should think proper, by a majority of two-thirds in each House, to remove the restriction. With a provision like this, the amendment would not receive the sanction of any Southern State. Would it not be better to limit the exclusion to those who held office, State or National, at the time of the rebellion and who had given it their support?

This last suggestion emanated from Senator Hendricks of Indiana. As the amendment read, he said it might exclude persons who had held office a generation earlier as well as those in office when the war broke out. "If the amendment was in separate articles, so that each might be acted upon separately, by the States, the ratification of some would not be so fatal as a rejection of the whole." So far as arms were concerned, peace had returned; but as to harmony, peace was apparently as far off as ever. The effect on the prosperity of the Southern States, by keeping them in a condition of thraldom, would be disastrous. It would exclude immigration and drive away capital. Many Southern men, whom the amendment would disqualify, "believed that the Constitution, as it stood, gave them the right to secede." There were those North as well as South who maintained the same doctrine, and the opinion was as honest South as North. But the people of the South had become satisfied by the result of the war that the doctrine could never be maintained. It was not magnanimous to exclude this numerous class if the masses of the South were to be won back to loyalty;

the exclusion therefore should not be suffered to stand.

The Joint Committee showed great sagacity in combining the several propositions into one amendment. They had submitted rather an anomalous resolution, but backed by a heavy majority in each House, they insisted that the propositions, however heterogeneous, should be treated as one amendment. Had the four sections been submitted separately, their ultimate adoption, which doubtless was surer, from the first, would have been effected by different majorities. Democratic Senators, like Guthrie of Kentucky, though supporting the amendment as a whole, characterized its disqualifying proposition as a proscription that would only irritate the South; for an amendment which deprived them of the public service of their most intelligent men would be rejected almost unanimously. Hendricks would have the disqualification apply only to those who had violated their oath to support the Constitution of the United States while they were holding office, State or national, but his amendment was rejected.[1] The Senate also rejected two amendments by Reverdy Johnson, the first to strike out the disqualification of State officers;[2] the second, limiting the disqualification to ten years preceding the first of January, 1861;[3] the difficulty of securing a two-thirds vote of both Houses, to remove disqualifications, led Saulsbury, of Delaware, to propose the alternative of pardon by the President; but this was rejected.

But was not the disqualifying clause superfluous? The oath already required by the Constitution, of all officers in the national government, sufficiently effected the purpose intended by the amendment. This objection was made by

[1] 34 to 8, May 30, 1866. Globe, p. 2899.
[2] By a vote of 32 to 10.
[3] By a vote of 32 to 10.

Senator Doolittle, who also opposed the amendment because it applied equally to those who had been forced into the rebel service and to those who had gone voluntarily; moreover it would annul pardons and amnesties already granted by the President and authorized by Congress. Would it not, in like manner, affect those who had complied with President Lincoln's proclamation of amnesty?[1] But, it was asked, would not amnesty and pardon relieve from all civil disabilities and restore to all civil rights? This raised the whole question of the President's pardoning power. Senator Grimes, at this point, explained that the amendment was intended to prevent the commission of offenses in the future; the presumption being fair and legitimate that the man who had once violated his oath would be more liable to violate his fealty to the government. The President's proclamation of May twenty-ninth, 1865, had been issued under an explicit declaration by Congress of his power to do so.[2] The amendment now proposed embraced large numbers of persons to whom pardon and amnesty had been granted; therefore, it was a violation of good faith by the government. Some five hundred and thirty-five principal officers of the late Confederate government who had left the service of the United States, remained unpardoned. Was it right to treat the thousands who had taken the oath in like manner as these few hundred who had not?

But a more serious objection to the amendment was its plain assumption, on the part of Congress, of the right to prescribe the qualifications for holding State offices. This was interfering with a power which belonged exclusively to the people of a State. But the amendment, to limit the disqualification to those who voluntarily supported the

[1] See p. 72.

[2] Act of July 16, 1862. Statutes at Large, XII, 589.

Confederacy, received only ten votes, the strength of the opposition;[1] and a proposition to except from the operation of the amendment those who had already received pardon and amnesty, was supported only by the same number. The roll being called, Senator Howard's amendment was then agreed to.[2] It was a test vote, and disclosed the strength of the two parties in the Senate. Senator Hendricks, of Indiana, one of the ten who steadfastly opposed the amendment, characterized its purpose "to constrain every State to confer the right to vote upon the negro;" the penalty, in case of refusal, being the loss of representation. It was so framed, he said, as to continue full representation to the border States, but to discriminate against those further South; thus it violated that equality among the States which the Constitution professed to guarantee. To strip a citizen of the right to vote in the manner proposed by the amendment was a usurpation of judicial functions by Congress.

The section declaring the public debt inviolate was for the benefit of the bondholders, but it would only "excite distrust and cast a shade on public credit; the bondholders did not need this extraordinary guarantee." No one had attacked the public credit or questioned the obligation of the government to pay its debts; the proposition, therefore, was superfluous. As to debts contracted in aid of the rebellion, who was so stupid as to suppose them legal, or having any valid existence for one hour after the *defacto* government of the Confederate States ceased to exist." Nor was this the final objection; the clause, giving Congress the power to enforce the article by appropriate legislation, was full of danger. When the words were used in the amendment abolishing slavery, they were thought to be

[1] Nays 10, yeas 30; May 31. Globe, p. 2921.
[2] 32 to 10. Ib.

harmless; but, already, such force and scope of meaning had been claimed for them "that Congress might invade the jurisdiction of the States; rob them of their reserved rights, and crown the federal government with absolute and despotic power." Thus were re-echoed in Congress the fears of Florida; expressed when it ratified the Thirteenth Amendment; and of Mississippi when it rejected it.[1]

In re-organizing representation, it was clear that there was to be an end of the old basis of federal numbers; but should representation be apportioned to population, or to the number of electors? Senator Doolittle wished to base representation throughout the Union on the number of males over twenty-one years of age in each State; but he had little support,[2] and his proposition to base it upon male electors was also rejected.[3] Senator Williams, of Oregon, at this point, suggested several verbal amendments which, in the aggregate, involved the question of requiring a State, before making up its basis of representation, to allow no discrimination between the right to vote at a State election and to vote under the Constitution and laws of the United States.[4] The question was a nice one, not only because it involved the right to vote, but also because it involved the penalty of an abridgment of representative power in any State in proportion to the denial which it might make of the right to exercise the elective franchise.

Did Congress possess the right, under the Constitution, to regulate the franchise in the States? The amendment, now proposed, recognized this right in the States; but if any of them refused the right to the negro, and it be a

[1] See p. 195.
[2] Rejected, 31 to 7; June 6. Globe, p. 2986.
[3] Globe, p. 2991. Rejected by the same vote.
[4] Ib.

wrong, was the government of the United States competent to redress it? The exclusion of a portion of the representation of a State, because it had denied or abridged the elective franchise on account of race or color, was a clear implication that Congress possessed some authority in the matter. But was it not also an implication that Congress could prescribe qualifications for the franchise? It admitted the right of a State to make the exclusion, though it attached a penalty for the exercise of the right. The obvious purpose of the clause, as no exclusion of white men had ever been known, was to make it of interest to the States to include the negro as an elector. The amendment was, therefore, in the nature of an inducement, not of a threat. Clearly, it did not express the right of Congress to regulate the elective franchise. To this extent it was a recognition of that "residuary sovereignty" of which Hamilton and Madison had spoken so frequently in the Federalist.[1]

The question of citizenship having come up, the principles involved in the Dred Scott case and its multitudinous decision were again reviewed, and the decisions of State courts as to the citizenship of persons of the African race. The great error of Chief Justice Taney, in his decision, said Senator Henderson, was his arbitrary exclusion of all negroes, though they were free, from the sovereignty which composed the Government. The amendment now under discussion would practically reverse the Dred Scott decision. Whatever the legal status of the negro, in 1857, the war had brought him into the body of American citi-

[1] For an account of the concept of sovereignty, 1776-1800, see the Constitutional History of the American People, 1776-1850, Vol. I, Chap. vi. See the Federalist, LXII; LXXI; see also the debate on sovereignty in the Federal Convention, recorded in Vol. I, pp. 307, 308, 371, 389, 393, 413, 451. See also the doctrine laid down in Texas vs. White, 7 Wallace, 700.

zens, and he must be treated as a citizen henceforth for all time. The States, said Howard, would, under the proposed amendment, retain the power which they had always possessed, of regulating the right of suffrage; Congress was not endeavoring to take it from them. The theory of the whole amendment was "to leave the power of regulating the suffrage with the people or legislatures of the States, and not to assume to regulate it by any clause of the Constitution." His objection, and it was the principal one to the changes suggested by Senator Williams, was, that they went too far. A State might choose to classify its electors by allowing one set, duly qualified, to vote for governor; another, for members of assembly; a third for judicial officers; a fourth, for local officers, and yet a fifth, for electors of President and Vice-President.

To avoid confusion, was it not best to make the basis of representation the simple test of the qualifications of voters for the most numerous branch of the State Legislatures? Otherwise, the basis of exclusion might prove so various, in the several States, as to make the administration of the amendment practically impossible. But, the Senate was convinced of the superiority of the William's amendments and adopted them.[1] Senator Howard's amendment, on the validity of the public debt, was concurred in, and the joint resolution as thus amended, having received the vote of two-thirds of the Senate, was passed.[2]

Among the thirty-three, by whose vote it passed, were Charles Sumner, Lyman Trumbull and Benjamin F. Wade, who, though not participating in the debate on the resolution, had prepared the way for its adoption by their devotion to the civil rights bill and their advocacy of the

[1] Yeas 31, nays 11, June 8, 1866, Globe. p. 3041.
[2] Yeas 33, nays 11, absent 5. June 8, 1866. Globe, p. 3042.

amendments which, discussed at length in the Senate, but laid aside for the House resolution, were intended to effect the purposes sought by the resolution just adopted. The vote of Henry Wilson, soon to become Vice-President of the United States, may be said to have offset that of the chief of the opposition, Thomas A. Hendricks, who also was destined to the same high office. Reverdy Johnson, pronounced by many of his colleagues to be the greatest of living lawyers, voted against the resolution. Among its supporters were Williams, Creswell, Kirkwood, Fessenden and Sherman, all of whom later became Cabinet Ministers.

On the thirteenth, Thaddeus Stevens presented the amended resolution to the House, at the same time saying that the Union members of the Joint Committee were unanimously of the opinion that the Senate amendments ought to be adopted, and were willing to take the vote upon it at once. There was no disposition to re-open the discussion. The House and the country, said Stevens, were to be congratulated that the time was at hand "for the admission of a hitherto outlawed community into the privileges and advantages of a civilized and free government. It had been the dream of his life that the day should come when no distinctions would be tolerated, in this purified republic, save those that arise from merit and conduct." Though Stevens pronounced the amended resolution sent up from the Senate imperfect, he declared he was willing to accept it because he lived "among men and not among angels." The co-operation of the President was not to be expected. "He preferred restoration to reconstruction." He would have the slave States remain as nearly as possible in their ancient condition.

The Southern States, said Stevens, were conquered provinces, but the President maintained that they had

legitimate governments, and insolently demanded that they should be represented in Congress on equal terms with loyal and regular States. There was great danger that the supporters of this doctrine might soon overwhelm the loyal men in Congress; therefore, it should make no delay in adopting the new amendment. He then briefly summarized the changes which the Senate had made in the joint resolution. The first, defining who were citizens of the United States was "an excellent amendment, long needed to settle conflicting decisions between the several States and the United States." It declared this great privilege to belong to every person born or naturalized in the country. The second section of the original resolution had been but slightly changed, less, indeed, than he desired; it should have been more efficacious for the enfranchisement of the negro. The third change, substituting ineligibility for disfranchisement, was not an improvement. It opened the elective franchise to such as the State chose to admit. It endangered the government, both State and national, and might "give the next Congress and President to the reconstructed rebels." With the enlarged basis of representation in the South, and the exclusion of loyal men of color from the ballot box, there was no hope of safety unless in the prescription of proper enabling acts, which should do justice to the freedmen and make their enfranchisement the condition of the re-admission of these States into the Union. The amended resolution was then read by the secretary; the Speaker put the question of concurrence; the roll was called, and the joint resolution, proposing the Fourteenth Amendment to the Constitution, was passed.[1]

[1] 120 yeas, 32 nays, 32 not voting. June 13, 1866. Globe, pp. 3148-3149. This was identical with the Fourteenth Amendment of the Constitution.

On the sixteenth, the enrolled resolution was formally presented to the Secretary of State, and two days later was officially, and for the first time, published in the Washington Republican.[1] By a concurrent resolution, the two Houses instructed the secretary to transmit certified copies to the governors of the States, to be laid by them before the legislatures for ratification.

The amendment, unlike the Thirteenth, and that proposed in 1861 was not submitted to the President for his approval. The omission provoked a special message from him. Even in ordinary times, he said, any question of amending the Constitution must be justly regarded as of paramount importance. This was "enhanced at the present time by the fact, that the joint resolution was not submitted by the two Houses for the approval of the President," and also because, of the thirty-six States constituting the Union, eleven were excluded from representation in either House of Congress, although with the single exception of Texas, they had been entirely restored to their functions as States, had conformed to the organic law of the land, and had appeared at the national capitol by their Senators and Representatives. Nor was this all. The sovereign people of the Nation had not been given an opportunity to express their views on the important questions which the amendment involved. Grave doubts, therefore, might naturally and justly arise as to whether the action of Congress was in harmony with the sentiments of the people, and whether State legislatures, "elected without reference to such an issue, should be called upon by Congress to decide respecting the ratification of the proposed amendment."

The action of Secretary Seward, in transmitting the amendment to the State executives, was "to be considered

[1] Globe, p. 3241.

as purely ministerial and in no sense whatever as committing the President to an approval, or recommendation, of the amendment to the State legislatures, or to the people." On the contrary, "a proper appreciation of the letter and spirit of the Constitution as well as the interest of national order, harmony and union and due deference for an enlightened public judgment," might "at this time, well suggest a doubt whether any amendment to the Constitution ought to be passed by Congress, and pressed upon the legislatures of the States for final decision, until after the admission of such loyal Senators and Representatives of the unrepresented States" as had been, or might be, chosen in conformity with the Constitution and laws of the United States.[1]

The optimistic view which Johnson and the minority in Congress took of the condition of the Southern States, and the little that was said on the subject during the discussion of the Fourteenth Amendment, might seem to be a true picture of their political and social affairs at this time, were it not corrected by the mass of testimony which had been accumulating since the close of the war and was to continue accumulating for ten years after. Congressional discussion of the amendment had been necessarily confined chiefly to an examination of legal principles and their application to the new order of things. If the question be asked, why, in both House and Senate, all pending Constitutional amendments were set aside for that proposed by the Committee on Reconstruction, it may be answered, that this committee had the confidence and support of the party in power, and possessed evidence of the condition of the South which compelled Congress to set aside all minor matters and concentrate its attention upon the policy

[1] June 22, 1866. Globe, pp. 3356-3357; and Richardson's Messages and Papers of the Presidents, VI, 391-392.

which should re-establish a republican form of government in every Southern State. The ease and harmony with which provisional governors had been established and the Thirteenth Amendment ratified by the States lately in rebellion were largely deceptive. Restoration had been in form, but not in substance.

For our evidence of the truth of these things we must go to the voluminous reports on the condition of the South made to Congress. First of these in importance was the report of the Joint Committee on Reconstruction itself when it submitted the resolution, which, changed in the Senate, became at last the Fourteenth Amendment. At the time of its appointment, on the thirteenth of December, 1865, the committee was instructed to inquire into the condition of the States which had formed the so-called Confederacy, and to report what legislation was necessary in order that they might again be represented in the Union. As a result of this investigation, the committee had reported the resolution which became the Fourteenth Amendment and also two bills, one for restoring these States to their political rights, the other for declaring what persons were ineligible to office under the government of the United States. Neither of these bills passed in their original form; expanded and made more rigorous, they ultimately became the four great acts of reconstruction.

Though we learn, from the debates in Congress, many reasons for the adoption of the Fourteenth Amendment, we learn more from the report which the Joint Committee on Reconstruction made when it offered the amendment. At the close of the rebellion the South was in a state of utter exhaustion. Its people had laid down their arms, only when compelled to. The States were bankrupt and individuals were shorn of their private wealth. "They were also necessarily in a state of complete anarchy, without

governments and without the power to form them, except by the permission of those who had been successful in the war." Even the President, when appointing the provisional governors, recognized this condition and proceeded to organize their governments anew. He had no power over the subject save as Commander-in-Chief of the army and navy of the United States. Congress alone could provide for the civil contingencies in the South. It was subject to martial law only. These people had withdrawn their representation in Congress, had levied war against the United States, had destroyed their State constitutions in respect to the vital principles which secured the States in their federal relations, and had left nothing of which the United States were bound to take notice.

The President had the alternative of assembling Congress and submitting the whole Southern question to it, or, of continuing military supervision over the South, until Congress should regularly meet. He chose to continue military rule and appointed the provisional Governors. These he commissioned, and they were paid out of funds in the War Department. They had only a military authority. "They had no power to organize civil governments, nor to exercise any authority except that which inhered in their own person under their commissions." So too, the President's power as Commander-in-Chief, was only military. "It was for him to decide how far he would exercise it, how far he would relax it, and when, and on what terms he would withdraw it." It was therefore discretionary with any of these provisional governors, acting in a military capacity, to recognize the people of a State as having resumed relations of loyalty to the Union; but it was not the function of any provisional governor "to decide upon the nature or effect of any system of government which the people of the State might see fit to adopt."

This power belonged exclusively to Congress; therefore, all the acts of the President, relating to the formation of State governments in the South, and the conditions which he had imposed upon them, were nothing more than intimations that as Commander-in-Chief of the army he would consent to withdraw military rule, just in proportion as the Southern people, by their acts, should manifest a disposition to preserve order among themselves; to establish loyal governments, and "to exhibit a settled determination to return to their allegiance; leaving it with the law-making power to fix the terms of their final restoration to all their rights and privileges as States of the Union." "Any other supposition inconsistent with this would impute to the President designs of encroachment upon a co-ordinate branch of the government."

In his annual message, the President in general terms had declared that most of the States lately in rebellion had organized local governments and acceded to his terms, but he had not communicated the details for the information of Congress. Their condition, he said, justified their restoration to the Union; yet Congress was obliged either to act blindly on his opinion, or to obtain information requisite for its intelligent action on this subject. The response of the President to its call for information was long delayed and scanty when made. The new constitutions and ordinances adopted in the South, had not given evidence of the loyalty of those who had participated in the conventions, and only one State, North Carolina, had made provision for submitting the action of its convention to the final judgment of the people.[1]

Meanwhile, the President had not removed the military force, or suspended military law, or restored the writ of *habeas corpus*. In all the States excepting Tennessee and

[1] See p. 287.

perhaps Arkansas, the elections held for State officers and members of Congress had resulted almost universally in the defeat of candidates who had been true to the Union, and in the election of notorious and unpardoned rebels; men who could not take the prescribed oath of office and who made no secret of their hostility to the National Government. It, therefore, remained for Congress to determine "whether their restoration to their former relations with the United States should only be granted upon certain conditions and guarantees, which would effectually secure the Nation against a re-occurrence of evils so disastrous as those from which it had escaped at so enormous a sacrifice." To secure a basis for the action of Congress, in answer to this inquiry, the condition of the South had been made the object of exhaustive investigation, upon the results of which the Joint Committee made the propositions, which now became the basis and conditions of reconstruction.[1]

The claim for the immediate admission of Senators and

[1] The work was divided and placed in the hands of four sub-committees, the first, on Tennessee, consisting of James W. Grimes of Iowa of the Senate and John A. Bingham of Ohio and Henry Grider of Kentucky of the House. Its report comprises the first part of report No. 30 of the Joint Committee of Reconstruction, House of Representatives, Thirty-ninth Congress, First Session; the second sub-committee, Jacob M. Howard of Michigan of the Senate, Roscoe Conkling of New York and Henry T. Blow of Missouri of the House on Virginia, North Carolina and South Carolina, whose report comprises part second of the above; the third sub-committee, of Ira Harris of New York of the Senate, George S. Boutwell of Massachusetts and Justin S. Morrill of Vermont on Georgia, Alabama, Mississippi and Arkansas, whose report comprises part third of the above; the fourth sub-committee, George H. Williams of Oregon of the Senate, E. B. Washburne of Illinois and A. J. Rogers of New York of the House, whose report on Florida, Louisiana and Texas comprises part four of the above.

Representatives of the South, which the committee believed was well founded "either in reason or law," was based on the proposition that the States, having no legal right or support from the Union, still retained their position in it as States; and, therefore, that their people had a right to immediate representation in Congress without the imposition of any condition; and, further, that until they were admitted, Congress had no right to tax them for the support of the Government, and that all legislation affecting their interests would be unjustifiable and oppressive, if not unconstitutional. These propositions the committee declared wholly untenable, and, if admitted, destructive to the government. Whether or not legally and constitutionally, the States did in fact withdraw from the Union and made themselves subjects of another government of their own creation. In thus waging civil war, they necessarily became subject to all the rules, which, by the law of nations, controlled such a contest, and to all its legitimate consequences. "One of these consequences was, that within the limits prescribed by humanity the conquered rebels were at the mercy of the conquerors."

If it was true that from the moment when rebellion laid down its arms, and actual hostilities ceased, all political rights of the rebellious communities were at once restored, then the government of the United States would be powerless for its own protection, and flagrant rebellion, carried to the extreme of civil war, would be a pastime at which any State might play; certain, not only, that it could lose nothing, but that it might even be the gainer by defeat. The question whether the late Confederate States were in or out of the Union was a profitless abstraction. Granting that they were in the Union, and could never be otherwise, it by no means followed that their people might not "place themselves in a condition to abrogate the pow-

ers and privileges incident to a State in the Union and deprive themselves of every pretense of right to exercise these powers and enjoy these privileges." A State within the Union has obligations to discharge as a member of the Union. It must submit to federal laws and uphold federal authority. A government, republican in form, must be sustained, under and by which it is connected with the General Government and through which it can discharge its obligations.

It was idle to contend that the people of the South still retained, through all their disloyalty, the perfect and entire right to resume, at will, all their privileges within the Union, and, especially, to participate in its government and control the conduct of its affairs. To admit such a principle, for one moment, would be to declare that treason is always master and loyalty a blunder. No portion of the people of this country whether in a State or a territory, has the right, while remaining on its soil, to withdraw from or to reject the authority of the United States. They must obey its laws as paramount,[1] and must enjoy its protection. As the Constitution acts, not upon States, but upon individuals, the people cannot escape its authority, though the States, by popular act, might cease to exist in an organized form and thus dissolve their political relations with the Union.[2] That taxation and representation must go together was not true under all circumstances and in every moment of time; for they did not go together in the District of Columbia or the territories. The people of the so-called Confederacy, having no right to throw off

[1] Compare with the adoption of the Declaration as to paramount allegiance by Maryland, and Nevada. See pp. 102, 116, ante.

[2] Compare President Lincoln's argument for the constitutionality of the act creating the State of West Virginia; see pp. 28-34 and note.

national authority, were bound at all times to share the burdens of the general government, otherwise there would be a premium on insurrection. Moreover, having disfranchised themselves by their own acts, they were "compelled to contribute their just proportion of the general burden of taxation, incurred by their wickedness and folly."

What then was necessary to be done before restoring the people of the South to the full enjoyment of all their original privileges? The war, which they had precipitated, "had materially changed their relations to the people of the loyal States." By a Constitutional amendment, slavery had been abolished and a large proportion of the population, mere chattels, had become free men and citizens. Throughout the struggle they had remained loyal and in large numbers had fought on the side of the Union. "It was impossible to abandon them without first securing them their rights as free men and citizens." Clearly, adequate security could be found only in appropriate Constitutional provisions, such as were comprised in the amendments which the committee submitted. The conclusion of the whole matter was, that Congress should enact such laws as, together with the amendments, would secure civil and political rights to the former slave. Unless he was granted them, the class which embodied "that spirit of oligarchy adverse to republican institutions, which finally inaugurated civil war," would continue in the exclusive possession of political power. "Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or to act directly on the subject. It was doubtful whether the States would consent to surrender a power they had always exercised and to which they were attached." As the best method of surmounting this difficulty,

it was concluded "that political power should be based, in all the States, exactly in proportion as the right of suffrage should be granted, without distinction of color or race." Leaving the whole question thus with the people of each State, it was believed that the advantages of increased political power would be an inducement to allow all to participate in its exercise.[1]

The evidence which President Johnson had set before Congress and which accompanied his special message on the appointment of the provisional governors and the progress of restoration of the Southern States to the Union, had failed to convince the Committee on Reconstruction that any insurrectionary State, except Tennessee, had placed itself in a condition to resume its relations with the Union. These lately rebellious States lacked a republican form of government, established by the people. Though the provisional Governors exercised only military authority, and "were simply bridging over the chasm between rebellion and restoration," they had called conventions and assembled legislatures, which, acting under executive direction, had adopted constitutions and ordinances as conditions precedent to the recognition of the States by the President. The inducement to this action was the immediate admission of Senators and Representatives to Congress. But the character of these conventions and legislatures had not inspired belief in the good faith of their members.

Governor Perry, of South Carolina, had dissolved its convention before it had received the direction from Washington that the rebel war debt must be repudiated.

[1] The committee prepared a constitutional amendment, to carry out this idea, which failed in the Senate. The joint resolution which finally passed involved the principle of the first amendment in another form.

He gave as his reason that the convention was a revolutionary body. The request for pardons for members of these conventions was the principal evidence of their disloyalty. Not one of the amended constitutions had been submitted to the people for ratification.[1] The North Carolina ordinance to that effect had not yet been complied with. Clearly no amendments could be considered valid unless adopted by the people. It would follow, therefore, that none of the so-called constitutions were binding upon the people and they would be justified in repudiating them at pleasure.[2]

The evidence which the President had submitted, that the people of the South were disposed to adopt measures conforming to the new order of affairs, was far from encouraging. The anti-slavery amendments, both to the State constitutions and to the national, were adopted with reluctance, while some States passed them by in silence, or boldly rejected them,—the language of all the provisions and ordinances on the subject amounting to nothing more than "an unwilling admission of an unwelcome truth." The ordinance of secession was declared by some States to be "null and void;" by others it was simply "repealed." In no instance was a refutation of the deadly heresy considered worthy of place in the new constitution.

[1] On the 2nd of August, 1865, the amended constitution of North Carolina was rejected by 22,543 votes to 18,579; the report of the Joint Committee on Reconstruction was made June 20.

[2] The committee here proceeded on the theory that a convention could not promulgate a constitution. Its ideas conformed to practices in the Northern States, but not in the Southern; constitutions there were almost uniformly promulgated. See The Powers of Constitutional Conventions in the case of Wells and Others vs. The Election Commissioners, 75 Pennsylvania State Reports, p. 205; (1873) For the Northern idea and for the Southern, see Sproule vs. Fredericks, 69 Mississippi, p. 898; (1892) See my Constitutional History of the American People, 1776-1850, Vol. II, pp. 176-177 and Index "Constitutional Conventions."

The President was not now criticised for his part in the conduct of these States. Ordinarily, authority to frame a constitution emanated from Congress and it was submitted to the people for adoption. This mode was pointed out by numerous States as an established usage. But in no case in the South, excepting in Tennessee, had the essential, preliminary steps been taken. The whole course of the reconstruction conventions had been irregular. Therefore, unless all the rules which, since the foundation of the government, had been deemed essential in such cases were disregarded, the Southern States were in no condition to claim representation in Congress. Undoubtedly Congress was competent "to waive all formalities and admit these Confederate States to representation at once, trusting that time and experience would set all things right." But the advisability of such a procedure would depend upon the evidence whether the ordinance and Constitutional provision, which the President had deemed so essential, would be permanently adhered to, and not repudiated by the people of the South after being admitted again to full participation in the Government. The burden of proof here rested upon the South, and it was the evidence now produced on the subject which lay at the foundation of the Fourteenth and Fifteenth Amendments and the acts of Congress immediately relating to them, which, in the aggregate, formulated its policy of reconstruction. What was this evidence?

The war was hardly closed, continued the report, before the people of the South came forward and haughtily claimed as a right "the privilege of participating at once in that government which they had for four years been fighting to overthrow." They had placed in power "leading rebels unrepentent and unpardoned, excluding with contempt those who had manifested an attachment to the

Union, and appointing in many instances those who had rendered themselves most obnoxious." Though the law required an oath which would necessarily exclude all such men from federal offices, they elected, "with very few exceptions as senators and representatives in Congress, men who had actively participated in the rebellion—insulting the law as unconstitutional." It was only necessary "to instance the election to the Senate of Alexander H. Stephens, the late Vice President to the Confederacy, a man, who, against his own declared convictions, had lent all the weight of his knowledge, ability and influence as a most prominent public man, to the cause of the rebellion, and who, unpardoned, with the oath staring him in the face, had the assurance to lay his credentials on the table of the Senate."

His uncontradicted testimony, and that of many others, proved that the pernicious doctrine of secession was not dead; that those who had declared against it had yielded only to necessity, and that, basing their ideas on State sovereignty they would willingly yield to no conditions whatever as preliminary to their resumption of power under a Constitution which they still claimed a right to repudiate. The Southern press abounded with abuse of the institutions and the people of the loyal States. It defended the men who led and the principles which instituted the rebellion. It reviled all loyal Southern men and, by every means in its power, kept alive the fires of hate and discord between the sections. The national flag was openly insulted. The Bureau instituted for the relief and protection of freedmen and refugees was almost universally opposed by the mass of the population, and maintained an existence only under military protection, while, at the same time, the Union men of the South, earnest in its defence, declared "with one voice that without its pro-

tection the colored people would not be permitted to labor at a fair price and could hardly live in safety." The testimony showed that without the protection of the United States troops, Union men, whether of Northern or Southern origin, would be obliged to abandon their homes.

In many portions of the South the feeling toward emancipated slaves, especially among the uneducated and ignorant, was "one of vindictive and malicious hatred." This deep-seated prejudice against color was assiduously cultivated by the public journals and led to acts of cruelty, oppression and murder which the local authorities took no pains to prevent or punish. There was "no disposition to place the colored race, constituting two-fifths of the population, upon terms of civil equality." The evidence went to prove that the people of the South were unwilling to contribute to the payment of the national debt, or to pay taxes levied by the United States, unless on compulsion; and that there was a prevailing belief that compensation would be made for slaves emancipated and property destroyed during the war. Though there was scarcely any hope, or desire, to renew the attempt at secession, a large number of witnesses, including Alexander H. Stephens, upheld the legal right of secession and the doctrine that the first allegiance of the people is due to the States. This belief prevailed generally "except in some of the northern counties of Alabama and the eastern counties of Tennessee."

Intense hostility to the National Government and an equally intense love of the late Confederacy were exhibited at every attempt of the United States to administer a conciliatory policy toward the South. The bitterness and defiance exhibited under such circumstances "were without a parallel in the history of the world." Confronted with such evidence as this, Congress was forced to con-

clude "that the States lately in rebellion were, at the close of the war, disorganized communities without civil government and without constitutions and other forms by virtue of which political relations could legally exist between them and the Federal Government. Congress could not be expected to "recognize as valid the election of representatives from disorganized communities, which, from the very nature of the case, were unable to present their claim to representation under established and recognized rules. For this reason, the so-called Confederate States were not entitled to representation. Before allowing it, Congress should require adequate security for future peace and safety, which could be found only in such changes in the organic law as would secure the civil rights and privileges of all citizens in all parts of the republic; would place representation on an equal basis; would fix a stigma upon treason; would protect the loyal people of the country against future claims for expenses incurred in suppression of rebellion and for manumitted slaves, and by an expressed provision of the Constitution would empower Congress to enforce these provisions by appropriate legislation.[1]

But nearly all questions have two sides, and the policy which Fessenden and his party associates would carry out toward the South was opposed by three members of the Joint Committee—Reverdy Johnson of Maryland, Rogers of New Jersey and Grider of Kentucky, who submitted a minority report. The Federal Government, they said, was formed out of States and by States possessing

[1] Report of the Joint Committee on Reconstruction, pp. VII-XXI. It was signed by Fessenden, Grimes, Harris, Howard, Williams, Stevens, Morrill, Bingham, Conkling and Boutwell. I have followed the report closely and made use of its language. It is the most concise and comprehensive statement of the Congressional policy of reconstruction.

equal rights and powers. Each was originally a separate sovereignty which could not be subjected to the Constitution without its own consent. All the States were admitted on an equal footing. While a citizen might forfeit his rights by committing crime against the United States, a State, in its corporate capacity, could not, because, as such, under the Constitution, it could not commit a crime or be indicted for one. Its citizens, few or many, might be proceeded against under the law and be convicted, but a State remained a State of the Union. It could never withdraw from it or be expelled. "A different principle would subject the Union to dissolution at any moment." The insurrectionary States were in the Union and the constitutional amendment was to be submitted to them as well as to all others.

To consult a State not in the Union on the propriety of adopting a constitutional amendment to the government of the Union, and which must necessarily affect only those States within it, would be an absurdity; and it would be nonsensical and unjust to allow an amendment, which States in the Union might desire, to be defeated by States not in the Union. The very fact, therefore, that the amendment was to be submitted to the Southern States was a concession that they had never ceased to be States of the Union. The idea that the war power of the United States, as such, had been used or could have been used to extinguish the rebellion, was utterly without foundation. "That power was given for a different contingency, —an international conflict." To subdue domestic strife, authority was given to call out the militia. The Government sought, and could only seek, to put an end to the rebellion. That once achieved, the ordinary condition of things was at once restored; therefore, the Southern States were entitled to the full enjoyment of their consti-

tutional rights and privileges.[1] They had governments completely organized and in successful operation, and no person within their limits questioned their legality or denied their protection. The right of the people of a State to form a government for themselves had never been questioned.

The Constitution imposed but one restriction, that the government adopted should be republican in form; it gave no power to frame a constitution for a State. In the words of the Federalist, "It supposes a pre-existing government of the form that is to be guaranteed."[2] It was not pretended that the existing governments of the Southern States were not of the required form, but only that they had not been legally established; a matter with which Congress had nothing to do. The power to establish or modify a State government belonged exclusively to its people; "when they shall exercise it, how they shall exercise it, what provisions it shall contain, it is their exclusive right to decide, and, when decided, their decision is obligatory upon everybody and is independent of all Congressional control, if such government be republican. Congress may admit new States, but a State once admitted ceases to be within its control and can never again be brought within it."

If the Southern representatives were admitted to the House, the members from the States in which there had been no insurrection would outnumber them by seventy-

[1] In support of this position there were cited the case of Amy Warbick vs. The United States District Court of Massachusetts. The case of the application for habeas corpus by James Egan and Ex Parte Milligan; 4 Wallace, pp. 2, 120; see also Ex Parte Vallandigham, 1 Wallace, p. 243. Ex Parte Watkins, 3 Peters, 193, and Tarble's case, 13 Wallace, p. 397. Several additional cases are cited in the report.

[2] Federalist, No. XLIV.

two votes, and, in the Senate, would have a decided preponderance. What danger to the Government, then, could possibly arise from Southern representation? Was the party in the majority in fear, or did it wish to keep the country in a turmoil, to reduce the States to bondage, to deny them their rights under the Constitution and to degrade their citizens merely that it might continue in power? Of the loyalty of Southern Senators and Representatives there was ample evidence; not the least trustworthy of which was the testimony of General Grant.[1] From his recent visit to South Carolina, North Carolina and Georgia, he had declared himself convinced that the mass of thinking men of the South accepted the new situation of affairs in good faith, and that the people were anxious to return to civil government within the Union.

Secession as a practical doctrine was almost utterly abandoned; it had failed in the ordeal of battle. Undoubtedly the States, North and South, would cheerfully adopt an amendment guarding against it. The Southern States had adopted constitutions free from intrinsic objections, and had agreed to every stipulation which the President had thought necessary for the protection and benefit of all. What more was necessary? The repudiation of the rebel debt? The denial of all obligation to pay for manumitted slaves? The inviolability of the national debt? If these provisions were deemed necessary, they could not be defeated, even if the South were disposed to defeat them, by the admission of its Representatives into Congress. But these measures were associated with others which it was believed the people of the South would never

[1] In his letter to President Johnson, December 18, 1865. See Messages of the President, December 19, 1865, Executive Document, House of Representatives, Thirty-ninth Congress, First Session, pp. 106-108.

adopt. They were asked to disfranchise a numerous class of their citizens, also to agree to diminish their representation in Congress—and, of course, in the electoral college—and to admit their colored males to the right of suffrage, a class in a condition of almost utter ignorance, thus placing them on the same political footing with white citizens. For reasons so obvious that the dullest might discover them, the right of granting the suffrage to the negro had not been directly inserted in any of these measures. "That would be obnoxious to most of the Northern and Western States; so much so that their consent was not to be anticipated." But as the proposed plan of reconstruction would have no effect on the representation of these States, because of the small number of negroes in them, it was thought that it might be adopted in the Southern States, because it would materially lessen their number in them.

The assent of the Southern States to the measure could hardly be expected, as its effect, if not its purpose, was forever to deny them representation, or, if they consented to the condition, to weaken their representative power and thus probably to continue in power the party which now controlled the Government. The proclamations of amnesty issued by President Lincoln and his successor, with the consent of Congress, were inconsistent with the idea that the parties they included were not to be considered, in future, as restored to all rights belonging to them as citizens of their respective States. "A power to pardon is a power to restore the offender to the condition in which he was before the date of the offense pardoned." These amnesties would be but false pretenses if they were to be practically construed as leaving the parties who had availed themselves of them in almost every particular in the condition in which they would have been if they had

rejected them. Expediency clearly demanded the immediate admission of the States. The North was deeply interested in restoring, to all their rights and privileges under the Constitution, the population of the South, nearly ten millions in number, and inhabiting an area larger than that of the five leading nations of Europe.[1]

The manner in which the amendment was proposed was impolitic and without precedent. Its several parts were without connection; "each if adopted would have its appropriate effect if the others were rejected, and each, therefore, should be submitted as a separate article. The repudiation of the rebel debt and of the obligation to compensation for the loss of slaves, and the inviolability of the national debt would undoubtedly meet the approval of many Southern States, but this part of the amendment could not be sanctioned without sanctioning the others. To force negro suffrage upon a State, by means of the penalty of a loss of part of its representation, not only imposed a disparaging condition, but virtually interfered with the clear and exclusive right of each State to regulate the suffrage for itself. The suffrage clause of the amendment, therefore, was its most objectionable feature.

These conflicting views of the majority and the minority of the Joint Committee accurately reflected the opinion of parties in Congress and public opinion outside. The Fourteenth Amendment involved an issue different from that raised when the Thirteenth was proposed. Slavery was then commonly recognized as the chief cause of the war. The North was eager to have it abolished, and the South could do no less than register an accomplished fact. The amendment, therefore, was taken up quite unanimously by the legislatures, North and South, and was

[1] Report of the minority, Id., pp. 1-13; the language of the report is quite closely followed.

ratified within the brief period of eleven months; ratification by the South being undoubtedly induced and hastened by the prospect of its speedy representation in Congress. Moreover, the amendment contained but a single provision. The Fourteenth, on the contrary, contained four provisions, each of which raised a distinct political issue. The first section embodied the substance of the civil rights bill and was not likely to be opposed North or South, because the old free States had always acknowledged that free persons of color possessed civil rights and the old slave-holding States had recently, by statute, granted them these rights. To ratify this amendment was, therefore, no more than to record an accomplished fact. The fourth section, on the validity of the national debt, and the repudiation of the Confederate debt, and of all claims for the loss of slaves, would not meet with opposition at the North. Public policy demanded the ratification of this clause.

The national debt, which at this time had reached its highest point, over two and three-quarter billions of dollars,[1] was held chiefly at the North, and its repudiation, or diminution in value, or any distrust of its obligation, would affect most disastrously the lives and fortunes of the Northern people and would injure our national credit abroad. Its validity was essential to our prosperity, however great the burden of payment might prove to be. But repudiation of the Confederate debt included the debt to the Southern States incurred in rebellion, and the claims for slaves which in the aggregate was twice as great as the national debt.[2] Repudiation would easily, naturally, and

[1] $2,773,236,173.69.

[2] The total loss by the South in property, assets and debts, State and Confederate, was estimated to be $5,262,303,554.29. Stevenson's Report on the Finances of the Late Insurrectionary States, Washington, Government Printing Office, 1872, p. 1151.

it may be said, justly, be construed by the North as the penalty for rebellion. The reasons, however, which would lead the North to ratify this part of the amendment would lead the South to reject it. But the attitude of the North and South toward the national and Confederate debts was like that toward the third section of the amendment, on the disqualification for holding office. The North would view it as a just punishment for treason and would easily ratify it; the South would consider it an outrage upon intelligence, and tending to put every Southern State into the control of the negroes. Its second section, on representation, could affect the North but slightly. The ninety thousand male negroes, of voting age, in the North, distributed from Maine to California, were not sufficient in number to affect any local election. But the section, by including negroes in the voting population, would nullify the election laws of sixteen of the Northern States. For years the free negro had been unwelcome in every Northern State save five.[1] He was excluded by statute in the North from the body of voters, and the constitution of Oregon went so far as to forbid him to enter the State.

The outlook for the ratification of the amendment therefore, though hopeful, was not assuring. The New England States might be counted on for ratification, and the border States, excepting West Virginia and possibly Tennessee, for rejection. Their opinion was well expressed in a recent joint resolution of the Delaware legislature, that the extension of the right of suffrage to negroes in the District of Columbia was a lasting stigma and disgrace to the free white men of the country.[2] New York,

[1] Vermont, New Hampshire, Massachusetts, New York and Nebraska.

[2] See Senate and Assembly Journal, January 22, 1866.

judging from its recent vote cast against negro suffrage,[1] would probably reject; Ohio and Indiana were hostile to the negro; California and Nevada, great mining States, were not friendly to negro labor.[2] Thus to the six New England could be added only eight other Northern States whose ratification could be considered certain. The action of the South was problematical. Radical Republicans, like Charles Sumner and Thaddeus Stevens, expected a unanimous rejection and their opinion was shared by Union Democrats, like Reverdy Johnson, though for different reasons. As the Union consisted of thirty-seven States, ratification by thirty was necessary. It was not without anxiety, therefore, that Seward, the Secretary of State, transmitted the amendment to the governors.

[1] 1860; 1868, note, pp. 172-173.

[2] See my Constitutional History of the American People, 1776-1850, Vol. II, p. 12, on the question of free labor in California.

CHAPTER II.

THE NORTH ACCEPTS, THE SOUTH REJECTS THE FOURTEENTH AMENDMENT—CONGRESS PLANS RECONSTRUCTION.

Connecticut was the first State to take action on the amendment, and ratified on the thirtieth of June, a sign of the reception awaiting the amendment at the North. It was a party vote, the Democrats contending that Congress had no power to amend the Constitution so long as representatives from the South were forcibly excluded, and that the amendment itself was impolitic and inexpedient. The Republicans maintained that Congress had the right to treat the Southern States as conquered provinces.[1] The conflicting ideas of the two parties in Connecticut were repeated in conventions of other States and may be accepted as a brief of public opinion at this time.[2] New Hampshire and Tennessee followed in July.[3] Governor Brownlow had convened the Tennessee legislature

[1] For the ratification of Connecticut, see Documentary History, II, 641. The ratification was 11 ayes and 6 nays, absent and not voting 4; Senate Journal, June 25; and 131 ayes to 92 nays, absent and not voting 14, House Journal, June 27, 1866.

[2] For the State party platforms of 1866-1868, see the Tribune Almanac for those years.

[3] New Hampshire, July 7, 1866. See its ratification in Documentary History, II, p. 645. The House, June 28, yeas 207, nays 112; Senate, July 6, yeas 9, nays 3. See the resolutions of the Republican State Conventions at Concord, January 3, favoring, and those of the Democratic State Conventions at Concord, February 7, opposing ratification.

Tennessee ratified July 19; see its act in Documentary History, II, p. 635, 14 ayes, 6 nays, Senate Journal, July 11; 43 ayes, 11 nays, House Journal, July 19, 1866. The Union State Convention at Nashville, February 22, adopted resolutions deprecating the at-

in special session on the fourth for the purpose of ratifying the amendment, but in neither branch did a quorum respond. On the eleventh the House was still unorganized. but the Senate ratified on that day. The Speaker issued warrants for the arrest of eight refractory members and instructed the sergeant-at-arms to employ necessary force to bring absentees before the bar of the House. On the fifth one of the representatives had sent in his resignation which Brownlow refused to accept on the ground that its design was evidently "to reduce the House below a quorum and break up the legislature;" another member informed the governor that he would not vote on the amendment until he knew the wishes of his constituents respecting it. With characteristic promptness the governor requested General George H. Thomas, the military commander of the District, to assist in compelling the fugitive members to return and perform their duties. This delicate demand was transmitted to the Secretary of War, who instructed Thomas to abstain from any interference between the political authorities, as the administration of law and the preservation of the peace in Nashville belonged properly to the State authorities. At last the sergeant-at-arms was successful in arresting two absentees and brought them before the Speaker, thus securing a quorum. The amendment was then ratified by the House.[1]

Governor Ward of New Jersey convened its legislature in extra session on the tenth of September, for the purpose of passing on the amendment and urged its ratification "as the most lenient amnesty ever offered to treason."

tempt of Congress to force negro suffrage upon the South, opposed any interference with the Constitution, but approved the guarantee of the payment of the public debt.

[1] Compare the proceedings in the Pennsylvania Legislature in 1787, Vol. II, p. 19.

It was adopted the following day,[1] the Democratic members of the Senate, however, refusing to vote.

The legislature of Oregon assembled on the same day with that of New Jersey. At the preceding session, two Republican members of the House had been unseated and two Democrats admitted in their place. This gave the Republicans a majority of one in the House, and by that majority the amendment was approved. A resolution declaring the ratification illegal and fraudulent was lost by one vote.[2] The hostility of these two legislatures to the amendment was prophetic, for both States later withdrew their consent.

Vermont, the first State in the Union to grant all rights to negroes,[3] equally with whites, ratified in November. Its legislature went further than merely to record its approval by adopting resolutions—which were sent to Congress—that laws ought to be in force in all States guaranteeing equal and impartial suffrage without respect to color; thus emphasizing the cardinal political principle which had distinguished the State from its foundation.[4]

[1] For the ratification of New Jersey, see Documentary History, II, p. 657. The amendment passed the Senate by 11 ayes, the ten Democratic members refusing to vote; in the House by 34 ayes to 24 nays; Journal of the Senate and House, September 11, 1866.

[2] For the ratification by Oregon on September 19, 1866, see Documentary History, II, p. 661. The Senate ratified by a vote of 13 ayes to 9 nays; the House, same day, by 25 ayes to 21 nays.

[3] Constitution of 1777, Chapter 1, Article I, Id. 1786 and 1793.

[4] For the Vermont act of ratification, see Documentary History, II, p. 664. By the Senate unanimously; in the House, 196 ayes to 11 nays. See also the resolutions passed by the Republican State Convention at Montpelier, June 20, advocating "impartial suffrage and equal rights for all." The resolutions of the Democratic State Convention, June 29, made in reference to the amendment, deprecated the exclusion of the Southern States from representation in Congress.

Nine states, including Ohio, ratified in January; five in February; one in March, and one in June. New York in ratifying and by a large majority, adopted joint resolutions approving the policy of Congress.[1] Ohio later withdrew her consent.[2] The governor of Illinois, in transmitting the amendment to its legislature, declared that if it should fail of adoption, or if adopted should fail to secure its purposes, other more adequate and comprehensive measures would be proposed which could not fail to "restore and re-establish the Government upon the basis of the indivisibility of the Union, the supreme authority of its laws and the equal liberty of all its citizens, in every State in the Union."[3] West Virginia, the most zealous

[1] For the ratification by New York, January 10, 1867, see Documentary History, II, p. 668. See also the resolutions of the Republican State Convention at Syracuse, September 5, declaring the amendment to be "essentially to engrave upon the organic law the legitimate results of the war;" and the resolutions of the Democratic State Convention at Albany, September 11, affirming that President Johnson's proclamation of amnesty, May 29, 1865, restored the great mass of people of the South to all the rights and functions of citizenship. New York Senate, January 3, ayes 23, nays 3, four members later recorded their vote in the affirmative; House, January 10, 71 ayes, 36 nays.

[2] See the ratification by Ohio, January 11, 1867, in Documentary History, II, p. 675; the resolutions of the Republican State Convention at Columbus, June 20, endorsing the amendment; and those of the Democratic State Convention at Columbus, May 24, denouncing the exclusion of the South, "unless on the degraded condition of inferiority in the Union, and of negro political and civil equality enforced by the Federal Government." Ohio Senate, 21 yeas, 12 nays; House, 54 yeas, 25 nays.

[3] See the act of ratification by Illinois, January 15, 1867, in Documentary History, II, p. 690; also the resolutions of the Republican State Convention at Springfield, August 8, endorsing the amendment; and that of the Democratic State Convention, August 29, disapproving the policy of Congress. Senate, 17 yeas, 8 nays; Journal, p. 76; House, 60 yeas, 25 nays; Journal, Vol. I, p. 155.

of the border States for the amendment, ratified on the sixteenth.[1]

Kansas, which at this time was contemplating the question of striking the word "white" from its constitution, followed West Virginia, ratifying two days later.[2] Maine, the time of whose State election permitted it to be the first State to pass judgment on the Congressional plan of reconstruction, ratified on the nineteenth by an almost unanimous vote.[3] Nevada adopted on the twenty-second;[4] Missouri on the twenty-sixth,[5] and Indiana on the twenty-ninth, the Democrats recording their usual objections.[6] The legislature of the preceding year had submitted an amendment to the constitution striking out the word "white" as descriptive of electors. Minnesota, which at this time, by a small majority, rejected an amendment to its constitution granting impartial suffrage, ratified the national amendment on the first of February.[7] Rhode

[1] By a vote of 15 to 3 in the Senate and 43 to 11 in the House; see House and Senate Journal for January 16, 1867, and for the ratification, see Documentary History, II, p. 693.

[2] January 18, 1867; see Documentary History, II, p. 697; see also the resolution of the Republican State Convention at Topeka, September 5, and of the National Union State Convention, September 20. The ratification by the Kansas House, January 10, 76 ayes, 7 nays; Senate, January 11, 23 ayes, no nays.

[3] For the ratification by Maine, see Documentary History, II, p. 701. In the Senate, 30 ayes, no nays; in the House, 126 yeas, 12 nays; Journal, January 19.

[4] Documentary History, II, p. 705. The ratification was by a direct party vote; 34 yeas and 4 nays in the House, January 11, 1867; Senate, 12 yeas and 3 nays, January 22, 1867.

[5] Documentary History, II, p. 709; the vote in the House was 85 yeas, 34 nays, 14 absent; in the Senate, 26 yeas, 6 nays, 2 absent.

[6] Indiana ratified the thirteenth and fourteenth amendments; Senate, January 18, 1867, 30 ayes to 16 nays; House, January 23, 56 ayes to 36 nays. See the minority report in the House Journal, pp. 102-105, and the debates in Brevier's Legal Reports of 1867.

[7] The vote was 24,479 for impartial suffrage and 28,794 against it. For the ratification of the fourteenth amendment, see Docu-

Island on the seventh approved it with scarcely a dissenting vote.[1] In Wisconsin, public sentiment was pronounced in favor of the abolition of "discriminations at the ballot box founded on property, birthplace, creed or color;" and the amendment was carried on the thirteenth of February.[2]

Pennsylvania, at this time, was somewhat agitated over a decision of its Supreme Court sustaining the right of public carriers to discriminate against persons of color.[3] In the southern and southeastern portions of the State, and especially in the larger towns, where persons of color were in greatest number, there was no general disposition to grant them more than civil rights, but in the rural districts, and especially in the mountainous and northwestern portions of the State, public sentiment was more lenient. Pennsylvania ratified on the same day with Wisconsin.[4] Michigan followed two days later.[5] The

mentary History, II, p. 717. House Journal, January 15, 1867, 40 ayes to 5 nays; in the Senate, 16 ayes to 5 nays.

[1] For the ratification, see Id., p. 720.

[2] For the ratification, see Id., p. 723; also the resolutions of the Republican State Convention at Madison, September 4, endorsing the amendment; and those of the Democratic Convention, September 11, disapproving the reconstruction policy of Congress. In the Senate, 23 yeas, 10 nays; in the Assembly, 70 yeas, 11 nays, 11 absent or not voting.

[3] The case arose in Philadelphia County, where a colored woman brought suit against the Philadelphia and West Chester Railroad for damages which, she claimed, she sustained in being removed forcibly from one seat to another in the car.

[4] February 13, 1867, see Documentary History II, p. 727; also see the resolutions of the Democratic Convention at Harrisburg, June 11, opposing any amendment to the State Constitution giving the right of suffrage to negroes and disapproving the Congressional policy of reconstruction, and especially the threatening messages of Congress to regulate the elective franchise in the State. See also the resolutions of the Republican State Convention at Williamsport, June 26, endorsing the Congressional amendment. Senate, 21 yeas, 11 nays; House, 62 yeas, 34 nays.

[5] February 15, 1867, Documentary History, II, p. 731. In the Senate, 25 yeas, 1 nay; in the House, 77 yeas, 15 nays.

State at this time was about to vote on a new constitution which omitted the word "white," in defining the qualifications of electors. Massachusetts ratified in March,[1] and Nebraska, the youngest State in the Union, on the fifteenth of June, a year lacking a day from the time when the amendment was adopted by Congress.[2]

During the year in which the amendment had been before the States twenty-two had ratified which included all the old free States, and Tennessee, West Virginia and Missouri, the latter the first of the slaveholding States to adopt emancipation. Opposition in the North had gone practically no further than the protests of Democratic State conventions and minority votes in legislatures, but in the fifteen Southern States—almost one-half of the Union—the amendment had met with a different reception. The legislature of Georgia assembled in November and listened to the governor's message, the most important part of which related to the amendment. Why, inquired he, should the legislature vote on its adoption? The State had no voice in its preparation. Georgia was as distinctly and positively secured the one right as the other by the Constitution. Had its representatives and those of other States in the South aided in giving form to the amendment it might have come before the legislature "a less obnoxious thing." The policy of Congress seemed to be,

[1] March 20, 1867, Documentary History, II, p. 735; see also the platform of the Republican State Convention at Worcester, September 12, endorsing the reconstruction policy of Congress and characterizing President Johnson as "a dangerous and desperate man;" see the resolution, somewhat to the contrary, of the Democratic Convention, at Worcester, on the 14th of October. Vote, in the Senate, 27 yeas, 6 nays; in the House, 197 yeas, 29 nays.

[2] For this ratification, see Documentary History, II, p. 739. The fourteenth amendment was known as House Roll, No. 8; the vote in the House was 26 yeas and 11 nays; in the Senate, 8 yeas and 5 nays.

first, to push through the amendment without the aid of the South, and then say to its people, "Accept it or take the consequences." Representation was a material part in the process of passing the amendment; its omission made it "unconstitutional, null and void." If the States especially affected by it refused their assent, it could not be adopted without excluding them, and placing its ratification upon the votes of three-fourths of the States dominant for the time being. If the purpose of the amendment was to exclude the Southern States from Congress indefinitely, the menace would suggest its prompt rejection. Hostilities had terminated; "it was right and proper that the previously resisting States should, in the most equivocal and formal manner, abandon resistance" and "do whatever was necessary and proper to place themselves in Constitutional relations" with the Government. Georgia had already done this and the legislature should act on the amendment "with the same intelligent judgment and unflinching firmness they would have exercised when in full connection and in an unambiguous position." The spirit of the proposed measure met with prompt resistance.

The two Houses appointed a Joint Committee, which reported on the ninth. If Georgia, so ran its report, was not a State composing part of the Federal government, amendments to the Constitution could not properly be brought before its legislature. If it was a State and a part of the Federal Government, then the amendments had not been proposed according to the requirements of the Constitution, but in such a manner as forbade the legislature to discuss their merits "without an implied surrender of the rights of the State." A long discussion of federal relations followed, tending to establish two propositions, that Georgia was a State in the Union co-equal with any of the others, and, therefore, entitled to the same

rights and privileges; and, that the amendment had not been proposed in either of the methods which the fifth article of the Constitution required. The conclusion of the whole matter was a resolution to decline to ratify, which was adopted unanimously by the Senate, and almost so by the House.[1]

The message of Governor North to the legislature of North Carolina, which assembled at Raleigh on the twentieth of November, was hostile to the amendment and particularly to its clause on negro suffrage. The legislature refused to ratify. The reasons for refusal were given in the report on the amendment, made by the Joint Select Committee of both Houses on the sixth of December, and adopted by both a week later,[2] and may be accepted as the opinion of the majority of the people of the Southern States, at this time, on the question of ratification. The committee held that the amendment had not been submitted in a constitutional manner, because North Carolina and her ten sister seceding States had been repeatedly recognized as States in the Union by all departments of the Federal Government, both during and immediately after the war. Congress had recognized them as States in the Union by the resolutions of July, 1861; by the act apportioning taxation among the States; by that assigning them their respective number of representa-

[1] The vote in the House was 132 to 2. The report of the committee is given in the Annual Cyclopaedia, 1866, pp. 352-353.

[2] Report and resolution of the Joint Select Committee of both Houses of the General Assembly of North Carolina on the proposition to adopt the Congressional Constitutional amendment, presented by James M. Leach of Davidson, chairman, on the 6th of December, and adopted by both Houses on the 13th of December, 1866, Raleigh; William E. Pell, Printer to the State, 1866, 16 pages.

I am indebted to Professor Stephen B. Weeks of Washington, D. C., for the use of his copy of this report.

tives; by that re-adjusting the Federal judicial circuits, and by that which accepted as valid the assent of Virginia to the division of that State and established the State of West Virginia. Moreover the Federal Judiciary had recognized the Southern States as States in the Union by hearing and deciding cases carried up from their courts. The President had approved these acts of Congress, and Congress itself now recognized them as States in the Union by submitting the amendment to them for ratification.

Though the Constitution provided that no State, without its consent, should be deprived of its equal suffrage in the Senate, not one of the seceding States was represented in the Senate or House of Representatives; thus the contemplated amendment had not been proposed by a lawfully constituted Congress. In consequence of their exclusion these States had had no voice in the important question of proposing the amendment. If their votes were necessary to a valid ratification of the amendment, they were equally necessary in preparing it for submission to the States. The irregularity, therefore, with which it was submitted, would make the amendment of doubtful validity, if ratified. "It would certainly constitute a dangerous precedent; give rise to troublesome questions hereafter; remove the landmarks established by the fathers, and greatly tend to diminish that regard for the sacredness of the Constitution which all of our people ought ever to cherish."

The Constitution had not been complied with in any particular, in that the proposed amendment, in the form of the joint resolution which passed Congress, had not been presented to the President, and before it took effect been approved or disapproved by him. Even though on its original passage it might have received unanimous support, a repassage over his veto, by the two-thirds ma-

jority required, was necessary before it could take effect. By the principle practiced in submitting the amendment, "the Constitution would be at the mercy of the strongest, and could at any time be moulded according to the will of a mere majority, however unscrupulous and despotic. It would thus become the plaything of politicians and parties, its sanctity profaned, and its glory departed."

These views, the Committee said, were not presented in any spirit of captiousness, or in advocacy of mere sectional interests, notwithstanding the amendment proposed was unquestionably designed to affect only the Southern States. The question of ratification, they said, was of the greatest importance to the whole country, for the time might come when changes in the federal Constitution might be made in derogation to the rights and interests of other parts of the Union. But as the Constitution was made for all ages, for peace as well as war, it should not be marred by the incorporation of amendments shaped amidst the excitements of tempestuous days, and made a part of it through hasty and illconsidered methods, wholly unwarranted by the instrument itself.

Proceeding more in detail, the committee made particular objections to the amendment. The limitation in the first section, that no State should make or enforce any law abridging the privileges or immunities of the citizens of the United States, clearly violated the right of the State to regulate its domestic concerns in its own way, and, by neglecting to define those privileges and immunities, subjected the State to untold dangers. Whatever restriction any State might think proper, for the general good, to impose upon any or all of its citizens, might at once be annulled by the Federal Government as abridgments of privileges or immunities of the citizens of the Union. The laws of North Carolina forbade the intermarriage of white

persons and negroes, "but if this amendment be ratified the government of the United States could declare that this law abridged the privileges of citizens and must not be enforced and miscegenation would thereupon be legalized in this commonwealth." Though Federal action of this kind was improbable, it was possible, and its bare possibility, so the committee believed, sufficiently indicated the boundlessness of the power which the amendment would confer upon the Federal Government. The States had always claimed the exclusive power to regulate the suffrage, but by the amendment it would exist in them only by implication. With the right of the States thus left doubtful, what would prevent the Federal Government from inaugurating universal suffrage? Again, the power to enforce the amendment by proper legislation practically authorized the Federal Government to intermeddle between a State and its citizens in almost all conceivable cases, and thus to take away from the people of the State the management of their own municipal affairs. Such interference had, to some extent, been already inaugurated in the civil rights bill, the tendency of which, as well as of this prospective amendment, would break down and bring into contempt the judicial tribunals of the States, and, ultimately, transfer the administration of justice, both in criminal and civil cases, to the Federal Courts.

A serious objection to that part of the amendment implying the power of a State to regulate the suffrage was its imposition of a penalty upon any restriction of the franchise, and its offer of a premium for suffrage extension; the representation of a State and consequently its political importance being diminished in the one event and increased in the other. The manifest design of the provision was to bring about, by indirect means, the adoption of universal suffrage, irrespective of race or color; and

thus a premium was offered for the prostitution of the franchise. Nothing, said the committee, could be more threatening to the stability of our republican institutions; there could scarcely be a doubt that if the question of negro suffrage could commonly be considered purely on its own merits, and aside from the prejudices of the times, all thoughtful and well informed men would unite in condemning it as in the highest degree impolitic and unwise.

Another objectionable feature of the amendment was its making the basis of representation consist of the voters only—a provision manifestly inconsistent with the theory of our political system.[1] The true constituency was the whole population. While the negro, who formed so large an element in the population of the State, could not wisely exercise the right of suffrage, and therefore should be excluded from it, yet, "if there ever was a time when that race should be counted in the basis of representation," continued the committee, "it is now." For they were thrown as an immense burden on a few States and for many years would demand the utmost exercise of every moral agency "for their advancement in the scale of being."

The third section of the amendment was designed solely to affect the South. It virtually disfranchised a large portion of the people of North Carolina. It was well known that most of the able-bodied men of the State were Confederate soldiers during some part of the late war, and of those of its people, who were not in the army, scarcely an

[1] The North Carolina Constitution of 1865, Art. I, Sec. 1, apportioned representation, both for the Senate and the House of Commons, on the "federal population," thus excluding two-fifths of the negroes; the South Carolina Constitution of 1865, Art. I, Sec. 5, 7, apportioned representation among the "white inhabitants," thus excluding all the colored population. Both constitutions were rejected by Congress.

individual could truthfully say that he had rendered no aid or comfort to the Southern cause. All who had ever previously taken an oath to support the Federal Constitution, either as a member of Congress, as an officer of the United States, as a member of a State legislature, or as an executive or judicial officer of any State, were forever excluded from holding any office, either in the State or federal government, unless the disability should be removed by a two-thirds vote of both Houses of Congress, and it might be added, continued the report, that Congress, by this provision for the removal of disabilities, infringed the constitutional right of the President to grant pardons.

The immediate practical effect, therefore, of the amendment, if ratified, would be to destroy the whole machinery of the government of the State and reduce all its affairs to chaos by throwing out nearly every public officer, even down to the constable and the justice of the peace. It would hardly be possible to find enough men qualified to reorganize the State government and to fill its various offices. All experience proves that men raised to power on the ruin of their fellows and expecting success only by the suppression of the popular will, are generally the worst enemies of their own people; therefore, the disfranchisement of the entire mass of capable citizens would subject the State to a long period of ruin. The impolicy of imposing so general a disability upon those who in no way had taken part in the war was shown, the committee claimed, by the indubitable fact, that most of them were now as conservative, loyal and well affected toward the general government as any class of citizens. Those who personally had participated in the war were more thoroughly convinced than others of the finality of the decision and the utter folly of any future appeal to arms.

With few exceptions, these had readily acquiesced in the settlement of the questions in dispute, which had been made. Many, who, if the amendment was ratified, would be disabled from holding office, were among the most prominent and excellent citizens of the State and had always opposed secession. Their services would be greatly needed in the work of restoring prosperity. But if these and other degrading disabilities must be imposed upon so many citizens of the State, how, with any sense of honor or self-respect, could North Carolina assist in imposing them? It could not be expected that the people of the State would desire their representatives to assist in the work of their own degradation. What the people of North Carolina had done, they had done in obedience to her own behest, and if penalties had been incurred and punishments must be inflicted, it was not magnanimous or reasonable, much less honorable, to require them to become their own executioners.

As the federal debt was already sufficiently secured by the honest intention of the people to pay it, the fourth section of the proposed amendment was therefore useless. It was a noticeable fact, that the people of North Carolina, though taxed without representation and depressed and impoverished by the war, had cheerfully paid their internal revenue taxes. By seeking further to bind the people of the whole country to the payment of the public debt, by means of a constitutional provision, the Government at Washington betrayed a lack of confidence, not more in the people of the South than in those of the North. The Confederate debt was equally certain to remain unpaid. Indeed, most of it could never fall due, by reason of the terms on which it was contracted,[1] and the impoverishment

[1] Most of it was payable at a fixed period of time after a treaty of peace between the United States and the Confederate States of America.

of the whole South and the acts of repudiation which had already been passed would undoubtedly cause the remainder to be repudiated also. The refusal of the Federal Government to pay for slaves emancipated was a great injustice, continued the committee, especially to those citizens who had not favored secession, but it expressed the opinion that the people of North Carolina had never hoped seriously for its reparation.

In the final section of the amendment, which empowers Congress to enforce all its provisions by appropriate legislation, the committee detected a wide door open for the interference of Congress with subjects hitherto regarded beyond its range; and the extent to which this interference might be carried it was impossible to conceive. Here was a vast addition to the powers of the General Government confirming the tendency to centralization and consolidation which had been developed in late years. The overshadowing influence and prestige, far beyond what it had ever before possessed, which, in the nature of things, the war had given to the General Government, had been increased by the overwhelming defeat of those States which had always stood forth as the peculiar advocates of State rights, and by this term is to be understood State sovereignty. Everyone must perceive, therefore, and this was the conclusion of the whole matter, that even with the new constitutional grants of authority, the federal government was no longer what it once was, but that it had expanded into a mighty giant, threatening to swallow up the States and to concentrate all power and dignity in itself. If North Carolina were to accept the amendment and thus yield up her honest convictions of duty and of principle, in her most anxious desire for the restoration of her former relations with the General Government, and the admission of her representatives into Congress, what

guarantee, or even hope, would she have that her act of ratification would thus restore her? The unmistakable record of the last Congress, as well as of the indication of tone and temper since exhibited, proved, to the satisfaction of the committee, and as immediate events showed, to that of both Houses of the North Carolina legislature, that this humiliation and surrender of right and principle, would not be likely to facilitate, much less to effect, restoration. For these reasons, it was the advice of the committee that the general assembly refuse to ratify the proposed amendment,[1] and for these reasons both Houses adopted its advice.[2]

At the same time the legislature of Florida was in session and on the fourteenth it listened to Governor Walker's message which discussed the amendments somewhat at

[1] This report was signed by J. W. Leach, Chairman, Henry T. Clarke, H. M. Waugh, Jos. J. Davis, Thos. S. Kenanm, J. P. H. Russ, Arch. McLean, Phillip Hodnett, Jno. M. Perry, J. Morehead, Jr., D. A. Corrington, W. D. Jones. P. A. Wilson of the Committee dissented from its report "believing it would be to the interest of the State of North Carolina, considering all the circumstances, to ratify the amendment.

[2] The unconstitutionality of the Reconstruction Acts and of the Fourteenth and Fifteenth Amendments had ever been maintained by a strong party in the South. The opinion is frequently brought to light as in the opening address of Robert Aldrich, Temporary Chairman of the Constitutional Convention of South Carolina which met September 10, 1895: "The Convention of 1868 was the fruit of the Reconstruction Acts which were notoriously unconstitutional, of which one of the most prominent men in Congress, a leader of the party in power at the time, had the hardihood to say, there were only two fools in the United States who considered them constitutional, and if they were unconstitutional they were invalid. That the Constitution (of 1868) was made by aliens, negroes and natives without character, all the enemies of South Carolina, was designed to degrade our State, insult our people and overturn our civilization. It is a stain upon the reputation of South Carolina, that she has voluntarily lived for 18 years under that instrument after she had acquired full control of

length. By the principles of the Constitution, said he, federal representation and taxation were based upon the census and the exercise of suffrage was regulated by State laws; therefore, it was for a State and not for the United States to determine whether the basis of representation should be the census or the number of voters. But whatever basis a State might adopt, it had no right to demand that another State should adopt the same; much less had the Federal Government the right to make such a demand. To adopt the amendment would be to vote for the destruction of the State government of Florida; for it would disfranchise the best men in the State and leave no one capable of filling its offices; thus a military government would then be a necessity. The response of the legislature was in the same spirit. The State, it said, was willing to be taxed without representation; quietly to endure the government of the bayonet and to submit to threats of fire, sword and destruction, but it would not bring as a peace offering the conclusive evidence of its own self-created degradation. Other than its postal service, its people derived no benefit from being a State in the Union. They were recognized as a State for the purpose of working out their own destruction and dishonor and for ratifying this discriminating amendment but not for any of the benefits resulting from federal relations. In these resolutions the House unanimously concurred.[1]

Similar was the message sent, on the fifteenth of November, to the legislature of Alabama by its governor.

every department of her government; but is a lasting honor to the people of the State that when they took control of their own affairs, they set to work to do away with this instrument of their humiliation in the day of their defeat, and in its place to have an organic law which shall be the work of their own hands." Convention Journal, South Carolina, 1895, p. 2.

1 Annual Cyclopaedia, 1866, 325-326.

The civil rights clause of the amendment, he said, injured the liberties of the people of the whole country. Its second section changed the basis of representation, raised a question which had never been a source of trouble or inconvenience, and could not be legitimately claimed as forming any part of the results of the war. The disqualifying clause "would bring no possible good to the represented States, while it would reduce the unrepresented to utter anarchy and ruin." The amendment was proposed when nearly one-third of the States were unrepresented, and all of its harsh features were aimed directly at the South. Its ratification could not accomplish any good to the country "and might bring upon it irretrievable disaster." But discerning the probable course of affairs, he, three weeks later in a special message to both Houses, urged its adoption; his views, he explained, remained unchanged, but as there was an unmistakable purpose on the part of the majority in Congress "to enforce at all hazards their own terms of restoration," and favorable action upon the amendment must be the price of restoration to the Union, he advised its ratification. But it was rejected in both Houses, almost unanimously.[1]

In transmitting the amendment to the legislature of Arkansas, Governor Murphy recommended its ratification, and, on the tenth of December, a resolution thus "to calm the troubled waters of the political atmosphere," was offered in the House. But the Committee on Federal Relations, to whom it was referred on the same day, set forth their reasons why the amendment should be rejected. In addition to objections already advanced by Georgia and Florida, it was said that it had never been submitted to the President for his sanction, that it would confer on Congress under the guise of appropriate legislation, a

[1] Id., pp. 11-12.

great and enormous power, taking all control over their local and domestic concerns from the States and virtually abolish them. But most objectionable of all was the obnoxious intention of forcing negro suffrage upon the States, giving to Congress power to bring this about whether or not the States consented. No vote was taken on the amendment, but a Commission of Thirteen was created to confer with the government at Washington on federal relations. The purpose was to inaugurate a movement to unite the southern States and to formulate a plan of reconstruction, but it came to nothing.[1]

The amendment was sent to the legislature of South Carolina by Governor Orr with an adverse message advising that, if it was to be adopted, the legislature should "let it be done by the irresponsible power of numbers; but the people of the State should preserve their self respect and that of their posterity by refusing to be the mean instrument of their own shame." The committee to whom the amendment was referred in the House unanimously recommended its rejection.[2] In December, the Virginia Senate rejected it unanimously and the House gave it but one favoring vote.[3] On the fourth of January, Governor Bramlette sent the amendment to the Kentucky Senate accompanied with a message denying its constitutionality. He severely criticised the action of the Federal Government in its method of securing the amendment, and advised its rejection. In both the House and Senate, resolutions

[1] Id., pp. 27-29.

[2] Id., p. 709.

[3] Twenty-seven votes in the Senate, and, in the House, 74 to 1. Id., 765. The Republican State convention, in May, at Alexandria, advocated a State government which should exclude, for a term of years, all men who had given moral or material support to the rebellion, and, it demanded "immediate infranchisement of all Union Men without distinction of color."

were introduced to reject and were concurred in by large majorities.[1]

No less hostile to the amendment was the legislature of Delaware, which, like that of Kentucky, had not ratified the Thirteenth Amendment. It now resolved that the Fourteenth would deprive one section of the country of rights and privileges guaranteed by the Constitution; would excite and foster bitter and unkind relations between the North and South, and, if it did not altogether prevent a restoration of perfect union between the States, it would be destructive to the ends and purposes intended to be secured by the adoption of the Constitution. Delaware therefore expressed its "unqualified disapproval."[2]

In March, Maryland rejected the amendment and at the same time adopted most elaborate resolutions defending its decision.[3] After fully reciting the history of the Government, these resolutions declared that the amendment would violate State sovereignty, that the disqualification in the third section would operate as an *ex post facto* punishment, and that the State, having just ratified a constitution of its own which refused negro suffrage,[4] and which moreover claimed compensation for slaves, it could not, therefore, ratify the amendment.[5]

[1] In the Senate 24 to 9, Journal, January 10, 1867; in the House 67 to 27, Journal, January 10, 1867. I am indebted to Col. R. T. Durrett, of Louisville, for a transcript of the Journals. See acts of the Kentucky Assembly, 1867, Vol. I, pp. 119-120.

[2] February 7, 1867. Laws of Delaware, XIII, Part, pp. 303-304.

[3] March 23, 1867. Laws of that year, pp. 879-911. The vote for the resolution of rejection in the House was 47 yeas, and 10 nays; Journal, p. 1141. In the Senate 13 yeas and 4 nays; Journal, p. 808.

[4] Maryland Constitution, 1867; Declaration of Rights, Article XVII.

[5] Constitution of 1867; Declaration of Rights, Article XXIV: Slavery shall not be re-established in this State, but having been abolished under the policy and authority of the United States compensation thereof is due from the United States.

Louisiana was in a state of anarchy, and it was a question whether Texas possessed a legal State government. The amendment was practically ignored by these two States. Thus at the end of a year from the time when Secretary Seward had transmitted the amendment to the governors, it stood rejected by nearly one-half of the States in the Union. The Southern States had rejected it by a vote little short of unanimous.

While the amendment had been before the Southern legislatures, testimony of a most alarming nature had been accumulating before Congress, as to the condition of public affairs at the South. When the Committee on Reconstruction reported the amendment to Congress, it had also presented a mass of evidence most discouraging to the friends of the amendment. This evidence, all of which was given under oath, showed deep and general hostility and repeated acts of cruelty toward the freedmen, throughout the South. It showed that State rights doctrines and secession principles prevailed widely and that there was a general feeling of obedience to compulsion in submitting to Federal authority. No southern jury was likely to convict a man indicted for treason or for a crime committed against a negro. Southern politicians were hoping speedily to regain the balance of power in the Union and to secure by their political sagacity what they had lost in rebellion.

There was a common demand and a hopeful expectation that the United States would make compensation for the slaves emancipated and for the property destroyed during the war. The Freedman's Bureau was everywhere the object of hostility, though its presence was essential to the existence of the colored population. From all sections of the South came evidence of a disposition to refuse to the negro the returns of his labor and an unwillingness to

acquiesce in the results of the war. This ceaseless hostility to national authority was intensified by a disloyal press. To the truth of this accusation there was also negative testimony but it was not sufficient to persuade Congress that the evidence of the hundreds of witnesses who appeared before the joint Committee on Reconstruction and before the subcommittees, did not indicate the real condition of the South upon which Congress must proceed to legislate; nor was this all the testimony upon which Congress ultimately acted. Many special committees were appointed and each patiently and thoroughly investigated the subject it had in charge. The evidence laid before Congress was overwhelming. It demonstrated that many portions of the South were under the reign of crime. The terror was widespread. Violence, murder and sudden death befell the negro race in nearly every southern State. It may be doubted whether at the present time a faithful transcript of the record of the crimes perpetrated upon the negroes would, without investigation, be received as the truth. An American, to-day, would cry out against the record as too terrible to be true; but the record remains, spread on the archives of States and burned into the memory of thousands still living.[1] The

[1] The evidence of the condition of public affairs at the South at this time is contained in many volumes of reports. It begins in 1865 and accumulated for eleven years. The historian of the Constitution is not called upon to express opinions on this testimony. He treats it as evidence at law which convinced Congress that a line of action must be followed. As a brief of this evidence the following documents may be consulted: The Reports of Committees, First Session, 39th Congress, Vol. II, 1865-1866, being the report of the Joint Committee on Reconstruction. Id., Vol. III, on the Memphis Riots. Reports of Committees, Second Session, 39th Congress, Vol. II, 1866-1867, on the New Orleans Riots. House Miscellaneous, Second Session, 39th Congress, 1866-1867, on affairs in Arkansas and Eastern Virginia. House Miscellaneous, Third Session, 40th Congress, 1868-1869, on the condition of affairs

apology for these crimes against a feeble, and in many respects an inferior, race, was the fear of negro rule. Rather than endure this humiliation, many white men in the South banded together in open and in secret organization to exterminate the negro, rather than to submit to his domination. The cause was as old as humanity: racial hatred. It was the ancient feud between the white man and the black man; a feud as old as Europe, Asia and Africa. But what place had such a feud in the United States in 1866? Congress, by the force of events, was obliged to stand for what, a century earlier, were known as "the rights of man." The stern application of the

in Georgia and Mississippi. Senate Miscellaneous, Second Session, 40th Congress, 1867-1868, on the Apprentice Laws of Maryland and on Lawlessness and Violence in Texas. Executive Document, No. 57 to 70, Second Session, 39th Congress, 1866-1867, on the New Orleans Riots. Executive Documents, First Session, 40th Congress, 1867, on Atrocities in North Carolina, South Carolina, Georgia and Louisiana. Executive Document, Nos. 296-311, Second Session, 40th Congress, 1867-1868, on the Affairs in Florida, Georgia, North Carolina and Alabama. Executive Documents, Nos. 253 to 295, Second Session, 40th Congress, 1867-1868, on the Affairs in North Carolina, Georgia, Florida, Alabama, Arkansas, Louisiana and Texas. Executive Documents, Nos. 312-341, Second Session, 40th Congress, 1867-1868, on the Outrages in Kentucky and Tennessee and the Affairs in Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Mississippi, Arkansas, Louisiana and Texas. Executive Documents, Nos. 181-252, Second Session, 40th Congress, 1867-1868, on Affairs in Louisiana and Alabama. Executive Document, Nos. 84-102, Third Session, 40th Congress, 1868-1869, on the Outrages in Virginia; the Reports of Committees of the House of Representatives for the Second Session of the 42nd Congress, 1871-1872, on the Affairs of the Old Insurrectionary States in 13 Volumes: Vol. I, The Report of the Committee and the Views of the Minority; Vol. II, on North Carolina; Vols. III, IV, V, on South Carolina; Vols. VI, and VII, on Georgia; Vols. VIII, IX, X, on Alabama; Vols. XI and XII, on Mississippi; Vol. XIII, on Florida and six volumes comprising the Congressional Report on the Ku-Klux Conspiracy. They are identical with the Senate Reports.

doctrine, one of the corner-stones of the American political edifice, had to be made. The war must have been a failure without that application. The Republican party, at its birth, ten years before, had not declared in favor of such an application; but events compelled that party to make that application, in 1866, or else abandon its claim to the decent respect of the Nation and of mankind.

The negro must be protected, not in the old way, as property, but in the new way, as person, and if a person, then a being having civil and political rights. The evidence before Congress was cumulative and compelling. Action must be thorough. No half-way measures could be tolerated. The right treatment of the negro as a man must be exacted of the South as a condition precedent to representation in Congress. Violence must be prevented; murder and bodily injury, punished. This meant military coercion and military rule so long as Congress might judge them necessary and proper. The question was one of practical as well as of party politics. The question was altogether larger, as it was a moral, a national question. By the supreme law of the land, Congress, and Congress alone was the judge of the policy which finally should prevail. Congress was the embodiment of the national conscience as well as of the national power. The evidence before it convinced the majority of its members that a policy of reconstruction must be strictly carried out. This policy had for its immediate end the peace of the country and the protection of all persons within its bounds. The negro had ceased to be property; he was a person and must be recognized as a person before the law. But the law must be amended; the old regime must cease; the new order of the ages must be recognized. The negro must be treated by the white man as a person possessing industrial, civil and political rights.

Few now living can realize the revolution in southern thought which this change exacted. The South had, literally, to be born again, and the new birth came amidst the throes of war, industrial ruin and social upheaval. But Congress was inexorable, and Congress was only the organ of the awakened Nation. Whatever we may now think, as individuals, of the evidence on which Congress based its action, we cannot escape the conclusion that this evidence of the condition of the South as affecting the negro race lately emancipated constitutes the defense of Congressional reconstruction.

Though slavery and the slave code were abolished by the Thirteenth Amendment, a system of peonage was still enforced in New Mexico and attempts to introduce it had been made with some success in Texas and in parts of the Gulf States. On the second of March, 1867, Congress abolished and forever prohibited the system in the United States,[1] but the day of the passage of this law is memorable chiefly for the passage of the first great reconstruction act to provide for the more efficient government of the rebel States.[2] It was declared that as no local State governments or adequate protection for life or property existed in them, and as it was necessary that peace and good order should be enforced until loyal or good State governments could be established, they were divided into five military districts.[3] To each of these the President should assign an officer of the army not below the rank of brigadier general and should detail a sufficient military force

[1] Statutes at Large, XIV, 546.

[2] Id., pp. 428-430. It applied to Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Arkansas and Texas.

[3] Virginia, the first; North Carolina and South Carolina, the second; Georgia, Alabama and Florida, the third; Mississippi, and Arkansas, the fourth; Louisiana and Texas, the fifth.

to protect all persons in their rights. The whole South was thus put under martial law, but no sentence of death could be carried into effect, under the act, without the approval of the President. As the chief purpose of the act was to establish republican State governments, it provided that when the people of any one of the rebel States should have formed a constitutional government in conformity with the Constitution of the United States in all respects, and framed by a convention of delegates elected by its male citizens twenty-one years old and upward, of whatever race, color or previous condition, who had resided in the State one year previous to the day of election and were not disfranchised, and when its constitution had been ratified by a majority of the popular vote and had been submitted to Congress and had received its approval, and when the State legislature had ratified the Fourteenth Amendment, Congress would admit its Senators and Representatives on their taking the oath prescribed by law. The disqualifying provision of the amendment should apply in the election of delegates to the State convention and also to the electors of delegates. Until these conditions were complied with, the civil governments of the States should be provisional and military; and no person disqualified to hold office under the proposed amendment should be allowed to vote or hold office in the State.[1] The President vetoed the bill.[2]

[1] This was H. R. bill, 1143, reported by Thaddeus Stevens from the Joint Select Committee on Reconstruction, February 6, 1867. (House Journal, p. 345.) It was discussed in the House till the 13th of February, when it passed by a vote of 109 to 55. 26 members not voting. (Journal, p. 376.) It was received in the Senate and passed a second reading on that day, was discussed, amended and passed in the Senate on the 16th. The vote on the different clauses varying from 26 to 14, and 30 to 7. (Journal, pp. 290-294.) It was returned to the House on the 18th, discussed that day and the day following, when the House disagreed

His first objection was that it placed all the people of the ten States "under the absolute domination of military rulers." The declaration that no legal governments existed in these States and that they afforded no adequate protection for life or property was, he said, contrary to fact. Their civil administration was in substance and principle the same as that prevailing in the Northern States and in other civilized countries. The real object of the bill was not to establish peace and good order but to compel the people of the ten States to select delegates to constitutional conventions by elections at which negroes should be allowed to vote; to force them to insert in their constitutions clauses giving the right to negroes and to such white men as might not be disfranchised for rebellion or felony; to submit the constitution to these; further, to submit them to Congress for approval and to adopt the fourteenth amendment in their legislatures. Thus the purpose of the military rule proposed was to coerce the southern people into the adoption of principles and measures to which it was known they were opposed. This was without precedent of authority and "in palpable conflict with the plainest provisions of the Constitution." The division of the States into five military districts and the

to the amendment of the Senate and asked a conference. (Senate Journal, p. 306; House Journal, p. 424.) The managers appointed on the part of the House were Mr. Stevens, Mr. Shellabarger and Mr. Blaine. The Senate insisted on its amendments. (Journal, p. 306.) The House receded from its disagreement and further amended the bill (February 19-21) by a vote of 128 to 46. (Journal, p. 444.) The Senate agreed to the amendment of the House and passed the bill February 21st by 35 yeas to 7 nays. (Journal, p. 320.) The bill returned by the President with the veto message was passed by the House on the 2nd of March by a two-third vote (Journal, p. 583), and by a vote of 35 to 11 on the same day by the Senate. (Journal, p. 419.)

[2] See the veto message in Richardson, VI, 498-511.

judicial powers which the bill gave to the civil commanders were wholly unconstitutional. It created an absolute despotism. In this respect the bill discriminated against the people of the South and treated them in a way which the fundamental law forbade.

Moreover, the bill was passed by Congress in time of peace, when not one of the States brought under its operation was at war or in insurrection; while the laws of these States and the Federal Government were in harmonious operation, and the courts, State and Federal, open and in full exercise of their proper authority. That the bill was unconstitutional was clear from a recent decision of the Supreme Court.[1] It even violated the principle laid down in the opinion of the minority of the Court delivered by Chief-Justice Chase. By the Constitution, but one kind of military jurisdiction could prevail in time of peace,—defined in a code of laws enacted by Congress for the government of the national force. But this bill formed no part of such a code. Again, the Constitution forbade the exercise of judicial powers in any other way than by established courts; but this bill gave judicial authority to military commanders. The United States are bound to guarantee to each State a republican form of government, but the act put nine millions of people under a military despotism. It was a bill of attainder against all these millions not one of whom had been heard in his own defense. Why thus attempt to change the entire structure and character of a State government by compelling the adoption of organic laws and regulations which the people were unwilling to accept if left to themselves?

The negroes had not asked for the privilege of voting and the vast majority of them had no idea of what it meant. The bill not only thrust the suffrage into their

[1] In Ex parte Milligan, 4 Wallace, p. 2-131.

hands but compelled them, as well as the whites, to use it in a particular way. Unless they formed State constitutions, containing prescribed articles, and elected legislatures which should ratify the amendment, neither whites nor blacks could be relieved from the slavery which the bill imposed upon them. Aside from the impolicy of Africanizing the South, why thus violate the manifest, well known and universal principle of constitutional law that the Federal Government has no jurisdiction, authority or power to regulate the franchise for any State. "To force the right of suffrage out of the hands of the white people and into the hands of the negroes was an arbitrary violation of this principle." Equally unconstitutional was its practical exclusion of the South from representation in Congress indefinitely. But the bill, notwithstanding the President's objection, was passed over the veto, though by a diminished majority in each House.

On the twenty-third, a supplementary act was passed prescribing the details of the administration of the first act, and, particularly, for the calling of conventions.[1] No convention could be held unless a majority of all the registered voters in the State had voted on the question and at the places of registration. The elections and returns in each district were to be under registration boards appointed by the commanding general. If a constitution was ratified by a majority of the votes cast, one-half of the voters voting, it should be sent to the President, be by him transmitted to Congress and become the basis of the reconstruction of the State and of its admission to representation.[2]

[1] Statutes at Large, XV, 2-5.

[2] This bill (H. R., 33) was introduced in the House by James F. Wilson, of Iowa, from the Committee on the Judiciary, March 11, 1867, (House Journal, p. 35) passed immediately to a third reading and was adopted by 117 yeas to 27 nays; 16 members

The bill was passed, in conference, on the twentieth and returned to the House by the President with a veto message, three days later. The act of March second, he said, had prescribed the qualifications of voters in the South; this bill added an oath to be taken by every person before his name could be registered as a voter, that he had not been disfranchised for participation in the rebellion. It, therefore, imposed upon every person the necessity and responsibility of deciding for himself under the peril of punishment by the military commission. If he made a mistake as to what worked disfranchisement by participation in rebellion and what amounted to such participation. Almost every man, black as well as white, resident in the ten States during the rebellion had at some time and in some way, voluntarily or involuntarily, participated in resistance to the General Government. The question which the citizen was thus called upon to answer on oath was, therefore, a fearful one, which if answered in a wrong manner, though innocently, would submit him to the pains of martial law. The entire machinery of the election was to be under the command and control of the military in each district. Conventions worked out in

not voting. (Journal, p. 36.) It was amended in the Senate and passed March 16th by 38 yeas and 2 nays. (Journal, p. 55.) The House agreed to the amendment of the Senate and passed the bill with further amendment, March 18th, 99 yeas to 29 nays. (Journal, p. 58.) The Senate disagreed to some of the House amendments, but the House insisted upon them and asked a conference March 19th, appointing James F. Wilson, George E. Boutwell and Samuel S. Marshall. The conference report was agreed to by the Senate. (Its managers were Lyman Trumbull, C. D. Buckalew and Henry Wilson, March 19th, Journal, p. 66.) And the House on the following day. (Journal, p. 76.) It was returned by the President to the House with a veto message on the 23rd, and was passed over the veto by a vote of 114 to 25 (Journal, p. 98-102), and by the Senate on the same day by a vote of 40 to 7. (Journal, p. 88.)

this manner could not represent the wishes of the inhabitants of these States. The board of registration might, at will, exclude the great body of people from the polls and from every opportunity to vote for delegates who would faithfully reflect their sentiments. The whole purpose of this legislative machinery was to establish military law and military coercion. Under the test of a republican government, which Congress compelled these States by this act to make, no State in the Union was republican. If Congress, in order to secure such a government, could prescribe universal suffrage for negroes as well as whites, as a preliminary condition, the work of reconstruction might as well begin in Ohio as Virginia; in Pennsylvania as in North Carolina. In brief, the bill proposed a "fearful and untried experiment of complete negro enfranchisement,—and white disfranchisement almost as complete." It compelled millions of American citizens to submit indefinitely to the rigor of martial law. "A military republic, a government founded on mock elections supported by the sword," said the President,—quoting from Webster,—was "a movement indeed, but a retrograde and disastrous movement from the regular old-fashioned and monarchical system.[1]

Reconstruction had now become a contest between the President and Congress, which, in July, passed a second supplementary act declaring illegal the governments in the ten States; empowered the District Commanders to suspend or remove any civil or military officers and appoint others in their places, and admitted negroes to serve as members of any board of registration.[2] On the same

[1] Richardson, VI, 531-535.

[2] July 19, 1867; Statutes at Large, XV, 14-16. This was H. R., 123, introduced by Thaddeus Stevens, July 7, and passed that day by a vote of 122 to 34, twelve members not voting. (Journal, pp. 175-177.) It passed the Senate two days later by 32 to 6 in an

day Congress appropriated one million dollars to carry its reconstruction acts into effect.[1] The President promptly vetoed both bills.[2] The new act, he objected, extended military government over ten States and gave it unlimited authority, which no longer confined to the preservation of the public peace, the administration of criminal law, the registration of voters and the superintendence of elections, was made paramount to the existing civil governments; a more intolerable state of society could not be conceived and yet to this condition, Congress would reduce twelve millions of American citizens. It denied these the sacred guarantee of the Constitution. Not a person in the South could have the protection of the writ of *habeas corpus;* and thus a power which all the departments of the Federal Government acting in concert or separately had not hitherto tried to exercise Congress now attempted to confer on a subordinate officer. The District Commander was transformed into a civil officer, and however unfit for the duties, he might be made a law-maker or judge. The officer, or soldier, thus detailed to fill a civil

amended form. (Journal, p. 149.) The House agreed to the Senate amendment and further amended the bill, which was now disagreed to by the Senate and a conference asked. (Senate Journal, July 12, p. 152.) The House insisted upon its amendments, but agreed to the conference report by 111 to 23. The managers on the part of the House were Thaddeus Stevens, George S. Boutwell and W. Holman; on the part of the Senate Lyman Trumbull, George F. Edmunds and Thomas A. Hendricks. The Senate also agreed July 13, by 31 to 6. (Journal, p. 155.) The bill was returned to the House by the President with a veto message on the 19th and was reconsidered and passed by 109 to 25, thirty-seven members not voting. (Journal, pp. 232-239.) It passed the Senate on the same day by a vote of 30 to 6. (Journal, p. 177.)

[1] Statutes at Large, Vol. XV, p. 30.

[2] For the two veto messages, July 19, 1867, see Richardson, VI, 536-545.

office must execute its duties according to the law of the State, yet he was not required to give bond, or to have any of the qualifications which the State law prescribed. He would perform civil duties as a State officer as a federal agent. Thus the Federal Government, by the agency of its own sworn officers, would assume, in fact, the civil government of the State.

Here clearly there was a contradiction, as Congress declared the local State governments of the South to be illegal and yet provided that they should be carried on by federal officers, who were to perform the very duties which the State imposed on its own officers. "It certainly would be a novel spectacle if Congress should attempt to carry on a State government by the agency of its own officers," and it would be yet more strange if it attempted to carry on an illegal State government by the same agency.

The construction which the proposed law would undoubtedly require, in practical administration, was to be made by the soldiers and officers assigned to perform civil duties under it; and yet, even if the opinion of the District Commander was appealed to, he would be attempting duties with which he was altogether unfamiliar. Even he, by the bill, was not required to be bound by a judicial decision. Was it not too late to say that these ten political communities were not States of the Union? Congress, by its legislation, had again and again recognized them, as by apportioning representation and by dividing them into judicial districts.[1] Congress had called upon them to act through their legislatures upon the Thirteenth and Fourteenth Amendments, the first of which had been ratified by seven of these ten States. If their ratification was not legal, then slavery still existed in them, unless it had been

[1] Referring to the act of July 23, 1866.

abolished in their State constitutions; but as Kentucky had not abolished slavery, it would still remain in that State. But if true, that these States had no legal governments, then their abolition of slavery bound no one, for in now denying to them the power to elect a legal State legislature, or to form a constitution for any purpose, even for the abolition of slavery, Congress denied them the power to abolish it.

These States, as it happened, had not accepted the Fourteenth Amendment, and in consequence, it had never been proclaimed or understood even by Congress to be a part of the Constitution of the United States. The Senate had repeatedly sanctioned the appointment of marshals, district attorneys and judges for each of these States; yet if these had no legal governments not one of these judges was authorized to hold court. In appropriating moneys to pay the salaries of federal officers, in these States, and in executing the revenue laws they were treated distinctly as States and not as territories. Thus their civil condition was recognized by the Supreme Court, whose judges, in their allotted circuits, performed their duties in these as in other States. If in parts of the Union neither the Chief-Justice nor his associates had authority to hold court, every order, judgment and decree they rendered was void.

The reconstruction acts were passed on the theory that the ten States were conquered utterly and that they stood toward the Federal Government in a new relation which subjected them to military power. This theory the President combated. The United States had not conquered the places lately controlled by the Confederacy, but simply had repossessed them. Not a foot of land, not a public building belonging to any of these States had been confiscated by the General Government, nor taxed under fed-

eral law. Thus the substance of this veto message, as of all the others which the President wrote against the reconstruction acts, was the serious objection that they made the military paramount to the civil authority.[1] In April, 1866, he had announced by proclamation that the insurrection was at an end and that the people of the Southern States were loyally disposed and either had conformed or would conform, in their legislation, to the condition of affairs growing out of the Thirteenth Amendment.[2] The evidence now before Congress did not corroborate the claims of this proclamation nor did it support the veto message, and the supplemental act and the special appropriation bill were passed, notwithstanding the President's objections.

It has long been customary to associate reconstruction exclusively with the southern States, but a moment's reflection, however, will show that it applied to nearly every State in the Union. The reconstruction acts which the President had vetoed were essentially special legislation directed to the South, but the Fourteenth and Fifteenth amendments which were the crowning acts of reconstruction reorganized the civil structure of American government, State and national. Though the so-called franchise clause of the Fourteenth Amendment chiefly affected the southern States, it also affected those of the North, which, twenty-six in number, including the border States, had, excepting four,[3] hitherto excluded persons of color from the suffrage. By reason of disparity in the number

[1] The President's language is closely followed. The veto message on the million dollar act consisted of only a few lines.

[2] See the proclamation of April 2, 1866, respecting Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, Florida (Richardson, VI, 429-432) and of August 20, 1866, as to Texas. Id., pp. 434-438.

[3] Vermont, Massachusetts, New Hampshire, New York.

of their negro population, the northern States were not under the same inducement as the southern to adopt negro suffrage.

Every northern State, save Delaware and Kentucky, had now ratified the Fourteenth Amendment and it was primarily to compel its ratification by the South that Congress had passed its special reconstruction acts. While they were under discussion, and before the act of July was passed, Maryland, Michigan and New York,—States to which the acts did not apply,—had been forming new constitutions. In each State the question of negro suffrage had come up. Before passing final judgment on the recent rejection of the amendment by the southern States it will be well to consider the attitude of these three States toward the same question.

The people of Maryland considered the State constitution of 1864, somewhat as a revolutionary document, and at the election in April, three years later, chose delegates to a constitutional convention to assemble at Annapolis in May.[1] In framing the act calling it, the general assembly refused to extend the right to vote on the question of holding it, to male citizens of the State and of the United States of age and of "whatsoever race, color or previous condition." The Republicans of the State, in convention at Baltimore, on the twenty-seventh of February, had formally expostulated against the convention bill, because it discriminated against the loyal citizens of the State who were persons of color, and a month later, again expressed their hostility to the measure by formally invoking Congress to protect the majority of the people

[1] The vote April 10, was 34,534 for, and 24,136 against, a convention. See Proceedings of the State Convention of Maryland to form a new constitution, commenced at Annapolis, May 8, 1867, Annapolis; George Colton, Printer, 1867, 842 pages with reports. It adjourned August 17.

of the State, white and colored, and give the State a constitution on the basis of universal, or manhood suffrage.[1]

A similar demand was made, in the week following the opening of the convention, by a meeting of delegates, both white and colored, which had been formally summoned at Baltimore by the Republican State Central Committee. This body seriously discussed the question of holding an independent constitutional convention, whose delegates should be elected by the male citizens of the State irrespective of color, and of leaving it to Congress to decide which constitution should be recognized as valid. This proposition, however, only hinted at public feeling and was not carried out. The Annapolis Convention was not disturbed in its work, and the constitution which it framed was ratified on the eighteenth of September by a small popular majority.[2] The principal reference to the reconstruction acts in the new constitution was concealed in an article, in the Declaration of Rights, affirming that the provisions of the Constitution of the United States and of Maryland applied as well in time of war as of peace and that any departure from them under the plea of necessity tended to despotism.[3]

The general assembly was enjoined from providing for the payment by the State for emancipated slaves, but it was instructed to adopt such measures as it might deem expedient to obtain compensation from the United States and distribute it equitably among the former slaveholders.[4] The public opinion which dictated this clause prevented the State, as we have seen, from ratifying the

[1] See the resolutions of the Baltimore conventions of February 27 and March 27, 1867, in the Tribune Almanac.

[2] 4,116 votes, in a total of 70,188.

[3] Article XLIV; see Proceedings, pp. 26, 57.

[4] Article III, Section 37; See also Declaration of Rights, Article XXIV. See Proceedings, p. 29.

Fourteenth Amendment.[1] The elective franchise was limited to white men and the discussions in the conventions do not show that there was any disposition to extend the right to negroes. There was much complaint among the negroes of the State at this time against its apprentice laws and the exclusion of the race from enjoying the industrial privileges of white men, and from equal rights in judicial proceedings. These complaints were not remedied by the convention, though it made some effort to allow the blacks to give testimony in court.[2]

The Maryland convention had been in session a week when that of Michigan met at Lansing.[3] The constitution of 1850 limited the right to vote to white male citizens. Some effort made at that time to extend the suffrage to negroes, had amounted to no more practically than a suggestion.[4] The question of extending the right now soon arose, and it was proposed to submit the question to the electors as a separate provision, but it was finally decided to submit it as part of the constitution.[5]

[1] See page 320.

[2] As to the Apprentice Laws of Maryland at this time, see Senate Miscellaneous Document No. 24, 40th Congress, 1867-1868.

[3] See the Debates and Proceedings of the Constitutional Convention of the State of Michigan, convened at the City of Lansing, Wednesday, May 15, 1867. Official Report by William Blair Lord and David Wolfe Brown, Lansing, John A. Kerr & Co., Printers to the State, 1867; 2 volumes (folio) 1,072 pages; Journal of the Constitutional Convention of the State of Michigan, 1867, printed by order of the Convention under the supervision of Thomas H. Glenn, Principal Secretary of the Convention, Lansing; John A. Kerr & Co. (8 volumes) 943 pages. The Convention consisted of 75 Republicans and 25 Democrats.

[4] For an account of the civil conditions in the State of Michigan in 1850, see the Constitutional History of the American People, 1776-1850, Vol. I, Chapters vii-ix.

[5] August 9, Journal, p. 658-660; carried by a vote of 50 to 28. Debates, Vol. I, pp. 712-718; 779-789. An unsuccessful effort was made at this time to extend the right to vote to Indians civilized who had severed their tribal relations. Id.

The arguments advanced excluding the negro from the right to vote in Michigan were the same as those heard North or South whenever the question had been raised, and with these arguments we are already familiar. But there was a perceptible change in public opinion at the North which was sufficiently indicated in the determination of this convention to make the question an issue at the polls rather than to decide it itself. The article on the elective franchise at last adopted did not discriminate against the negro.[1] But the constitution failed to reflect public opinion and was rejected by a large majority at the April election,[2] at which the question of negro suffrage, though not separately submitted, was recognized as a distinct political issue.[3]

The constitution of New York of 1846, provided explicitly that at the general election twenty years later, the question of calling a convention to revise and to amend the constitution should be decided at the polls. In conformity with this provision, the people of the State had decided for a convention by a large majority vote in 1866, and it assembled at Albany on the fourth of June, of the following year.[4] Almost from the day of assem-

[1] Article III, Section 1; adopted by a vote of 67 to 15. See the Journal, pp. 767-768, and Debates, p. 899.

[2] April 6, 1868; for the Constitution 71,733 votes; against it 110,582.

[3] See the resolutions of the State Republican Convention at Detroit, March 16, 1868, advocating "the equality of all men before the law and an equal suffrage;" and the resolutions of the Democratic State Convention at Detroit, May 29, 1868, opposing negro suffrage.

[4] See the Proceedings and Debates of the Constitutional Convention of the State of New York, held in 1867 and 1868, in the City of Albany, reported by Edward F. Underhill, Official Stenographer, Albany; Weed, Parson & Company, Printers to the Convention, 1868, 5 Volumes (octavo) 3,971 pages with index; Journal of the Convention of the State of New York, begun and

bling, the delegates discussed the question of extending the franchise by abolishing the property qualification required of negroes,[1] a qualification which Francis Lieber, in an essay addressed to the delegates, characterized as a glaring inconsistency that ought not to be continued in the fundamental law.[2] With scarcely an exception the Republican delegates agreed with Horace Greeley, the chairman of the Committee on the Right of Suffrage, that

held at the Capitol in the City of Albany on the 4th day of June, 1867, Albany, Weed, Parson & Company, 1867, 1,547 pages; Documents of the Convention, 5 volumes. The Convention adjourned February 28, 1868. Among its members were William M. Everts, George William Curtis, Horace Greeley, William A. Wheeler, Charles Andrew, Charles J. Folger, George F. Comstock, Elbridge T. Gerry, Samuel J. Tilden, Edwards Pierrepont, Samuel F. Miller, Elbridge G. Lapham and Charles Daly. William A. Wheeler, afterward Vice-President of the United States, was elected presiding officer.

[1] The discussion is found chiefly in the First Volume of the Proceedings and Debates, pp. 100-411. It was during this discussion that George William Curtis made his great speech in favor of extending the right to vote, to women; pp. 364-372.

[2] In response to a request of the Union League Club of New York, expressed through John Jay, its President, Dr. Lieber wrote his "Reflections on the Change Which May Seem Necessary in the Present Constitution of the State of New York, Elicited and Published by the New York Union League Club, New York, 1867," 50 pages. He urged the abolition of the discriminating qualifications, saying: "So glaring an inconsistency ought not to continue in our fundamental law. The psychologic principle of humanity is first adopted; it is modified by a physiologic reason; and this modification is modified again by economic reason. Arguments taken from wholly different spheres are here strung together for sound logic, and it was an appeal that no property qualification be adopted in general; it also ought to be omitted with reference to persons of color, who are here, who cannot be extinguished by law, whatever may be done in the course of time by the process of absorption; whose race was forcibly brought hither by our race, and who had not in our State constituted the least respectable portion of the population" (p. 27). Dr. Lieber vigorously opposed the extension of suffrage to women; pp. 28-34.

the discrimination which had so long been made against the negroes in the State should be abolished. But so able and vigorous was the opposition, that the convention at last decided, though by a close vote, and as, shortly before, in Michigan, by shifting the responsibility, that the question should be submitted to the electors.[1] Not until the November election of 1869 did the new constitution go to the people, who by a majority of forty thousand votes refused to abolish the property qualification for colored men.[2]

The denial of negro suffrage, at this time, by Maryland; the overwhelming vote in Michigan, which rejected a free suffrage constitution, and in New York, the abolition of the property qualification for negroes, were an indication of public sentiment on the question which must be accepted as strongly supporting the President's ideas, if not equally with them disapproving any plan of Congress to force negro suffrage upon the States. It must be remembered that at this time the constitutions and laws of nearly every State in the Union gave no support to the recent reconstruction measures of Congress. In vetoing these measures, the President had the law, technically, on his side; but this, it is well to remember, does not prove that the law was right.[3] Written constitutions may be troublesome things in time of war. From the day when South Carolina declared its secession from the Union, some intelligent men had steadily claimed that secession, and all its consequences, were justifiable, and

[1] Journal, p. 1210. It was carried by 64 yeas to 54 nays.

[2] The vote, November 2, 1869, was 289,403 for the qualification, and 249,802 against it.

[3] The decision in the Dred Scott case suggests a parallel. Chief-Justice Taney did no more, in this decision on the status of the negro, than to summarize the decisions in re of the Courts of the States, excepting the three that gave the negro political rights.

that the principles of the Confederacy were those on which the fathers had founded the government. But the terrible consequences of secession had convinced the popular mind that it did not embody the true principles of nationality. The recent vote in Michigan and New York might be considered as discouraging, if it was an indication of the final judgment of the people of these States on the great national issue, reconstruction. Shortly before their constitutional conventions assembled, their legislatures had ratified the Fourteenth Amendment. The contradiction between the act of ratification and the recent vote at the polls was a proof that, when the question of equal negro suffrage was a local issue, the people of the northern States might discriminate against the black man as sharply as the people of any State at the South.

It was not until November that any of the southern States met in convention, but before three months passed all had assembled under the reconstruction acts. On the last day of August, General Pope issued an order for a three days' election in Alabama, beginning the first day of October.[1] Though there was a greater number of white than of black males in the State, the registration showed a majority of fifteen thousand negro votes.[2] Most of the whites abstained from voting for delegates to the convention.[3] Ninety-six of the delegates chosen enrolled themselves as radicals, and four, as conservatives; seventeen of the ninety-six were negroes and the greater part of the remainder were northern men and new-comers in the State, who identified themselves, politically, with the

[1] For the official record of this convention, November 5 to December 6, 1867, see its Journal and ordinances, 291 pages, Montgomery, 1868.

[2] The number of white males in 1866 was 261,004, and of black 214,253. The number of white voters, 72,748; of colored, 88,243.

[3] Total vote for the convention, 90,238; against it, 5,628.

blacks. Conscious of the protection of the military authorities, the colored delegates spoke and acted with freedom. They labored to secure for the people of their race equal privileges with the whites. The disqualifying clause in the reconstruction acts of March was made the basis for the article on the elective franchise, but, as finally adopted, was made much more severe.[1]

The negro delegates, and their white colleagues, feared that unless the men, lately in rebellion, were disfranchised under a sweeping clause, they would soon regain control of the entire State. By declaring that persons qualified

[1] 3. It shall be the duty of the General Assembly to provide, from time to time, for the registration of all electors; but the following classes of persons shall not be permitted to register, vote or hold office. 1st. Those who, during the late rebellion, inflicted, or caused to be inflicted, any cruel or unusual punishment upon any soldier, sailor, marine, employee or citizen of the United States, or who, in any other way, violated the rules of civilized warfare. 2d. Those who may be disqualified from holding office by the proposed amendment to the Constitution of the United States, known as "Article XIV," and those who have been disqualified from registering to vote for delegates to the Convention to frame a Constitution for the State of Alabama, under the act of Congress, "to provide for the more efficient government of the rebel States," passed by Congress March 2, 1867, and the acts supplementary thereto, except such persons as aided in the reconstruction proposed by Congress, and accepted the political equality of all men before the law: Provided, That the General Assembly shall have power to remove the disabilities incurred under this clause. 3d. Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, crime punishable by law with imprisonment in the penitentiary, or bribery. 4th. Those who are idiots or insane.

4. All persons, before registering, must take and subscribe the following oath: I, ——, do solemnly swear or (affirm) that I will support and maintain the Constitution and laws of the United States and the Constitution and laws of the State of Alabama; that I am not excluded from registering by any of the clauses in Section 3, Article 7, of the Constitution of the State of Alabama; that I will never countenance or aid in the secession of this State

to vote were also qualified to hold office, negroes were made eligible to both national and State offices. Opposition to this innovation was less intense, however, than to the proposition to enjoin common carriers from making any discrimination, on account of color, between persons traveling in the State in public conveyances, a provision which narrowly escaped adoption. It was generally affirmed, by the white men of the State, that the provision on the franchise, as finally adopted, would take the right to vote from forty thousand whites, and give the control of the State, except in six counties, to the blacks.

The fourth of February was set as the day for the vote on the constitution, the adoption of which was viewed with alarm by the whites. The conservative party organized meetings all over the State, and agreed that the thirtieth day of January should be observed as a day of fasting and prayer to Almighty God to deliver its people "from the horrors of negro domination." As by the act of Congress, in July, the constitution could not be adopted unless by a majority of the registered voters, the only hope of defeating it lay in the white electors' abstaining from voting. This means of defeating it, which Congress had not anticipated, the conservative leaders now advised and proceeded to carry out. By order of Major General Meade, the time for voting on the constitution was extended to four days,

from the United States; that I accept the civil and political equality of all men; and agree not to attempt to deprive any person or persons, on account of race, color, or previous condition, of any political or civil right, privilege, or immunity, enjoyed by any other class of men; furthermore, that I will not in any way injure, or countenance in others any attempt to injure, any person or persons, on account of past or present support of the government of the United States, the laws of the United States, or the principle of the political and civil equality of all men, or for affiliation with any political party. (Constitution of Alabama, 1867, Article VIII, Sections 3 and 4.)

because a fearful storm, which swept the State on the fourth and fifth, prevented thousands of voters from reaching the polls. The returns on the ninth of February, and later, showed that the constitution had failed of ratification by about eight thousand votes, although seventy thousand had been cast in its favor.[1]

The defeat of the constitution revealed to Congress a defect in the act of the nineteenth of July: the requirement of ratification by a majority of votes cast, one-half of the voters voting. In Alabama, though ratification was almost unanimous, less than half the voters, according to the register, had voted, and thus the clause in the act of July, which had been introduced to protect the colored vote, had proved, in the first election in the Southern States, a means for defeating the chief purpose of the law. In order to preserve the work of reconstruction done in Alabama, Thaddeus Stevens, on the eleventh of March, reported a bill for its admission, framed by the Committee on Reconstruction. On this day the error in the act of July was corrected, and the law was amended so as to provide that the question of the adoption or rejection of any constitution in a southern State should thenceforth be determined by a majority of the votes cast.[2]

[1] The returns reported by General Grant to Schuyler Colfax, Speaker of the House of Representatives, were 70,812 for adoption and 1,005 against (see Congressional Globe of this date, p. 1813). This report varies slightly from that of General Meade to General Grant, March 23, 1868, in Executive Document No. 238, House of Representatives, 40th Congress, second session, p. 2; the colored vote for the Constitution is there reported as 62,089; the white vote for it, 5,802; and that the Constitution had failed of ratification by 8,114 votes.

[2] Act of March 11, 1868, Statutes at Large, Vol. XV, p. 41. It had passed Congress on the 27th of February and became a law without the assent of the President. See the Globe, p. 1460; and Statutes at Large, Vol. XV, p. 41, and note. The election in Alabama was the immediate cause of its enactment.

The act requiring a majority of the registered votes to be in favor of the constitution, it was now said, in presenting the special act for admission, was an error of legislation and ought not to be applied to Alabama; especially as an amendatory act had just been passed by both Houses of Congress. But this reason for admitting the State was far less cogent than the mass of testimony before Congress, showing that the adoption of its constitution had been prevented, not so much by storm and flood as by irregularities in conducting the elections, by the intimidation of voters and by the destruction of the ballot boxes.[1] Not only had the whites refused to vote, but at hundreds of polling places, desperate characters among them had obstructed the voting, by acts of violence which had frightened away thousands of freemen and hundreds of loyal whites. During the two weeks' discussion of this bill, the atrocities which had prevented the adoption of the constitution were clearly set forth in the House, and on the twenty-eighth of March, in an amended form, the measure passed by a large vote.[2] As the subject had already been acted upon, by the passage of the amendatory act of the eleventh of March, the Senate reported the measure back to the House adversely, and action on it was indefinitely postponed. The Alabama constitution was accepted by Congress as having been duly ratified and it remained the supreme law of the State for eight years.

[1] The vote is preserved in the Executive Document No. 303 (67 pages), House of Representatives, 40th Congress, Second Session.

[2] One hundred and two to 30; 57 not voting. The Spaulding amendment, which was substituted for the original bill, recognized the Legislature chosen at the Alabama election, and empowered it to resubmit the Constitution to the electors. In compliance with the acts of March 2 and March 23, the State was to be admitted. See the Globe for March 28, 1868, pp. 2216, 2217.

The registration of voters in Louisiana showed the majority of blacks to be nearly two to one.[1] At the election on the twenty-seventh of September, the vote for the convention was almost unanimous.[2] Its delegates, of whom the majority were colored men, met at New Orleans on the twenty-third of November.[3] Of principal interest to its members was the question of some guarantee of political and civil rights to the freedmen. They not only demanded the elective franchise and the right to hold office, but complained that they were proscribed and ostracized when entering public places or public conveyances, and they demanded that this discrimination should be abolished.[4] The sentiments and indeed the final constitutional provision on these subjects were substantially the same as in Alabama. The right to vote and to hold office was given without discrimination to whites and blacks. An elaborate, disqualifying clause practically eliminated from the exercise of these privileges all who had been identified with the rebellion. A similar extension and discrimination was applied to office-holding.[5] At the election in April, the constitution was ratified by a majority of twelve thousand votes.[6]

1 The registration of voters on the 31st of July, 1867, gave 82,907 blacks and 44,732 whites.

2 75,083 for and 4,006 against a convention.

3 See Official Journal of the Proceedings of the Convention for Framing a Constitution for the State of Louisiana; New Orleans: J. B. Roudadnez & Co., Printer to the Convention, 1867-1868. 315 pages. It adjourned March 7, 1868. James B. Taliaferro, conspicuous for his Union sentiments in the Louisiana Secession Convention of 1861, was elected President.

4 Journal, p. 26.

5 Louisiana Constitution, 1868, Articles 98, and 99, 108.

6 April 14, 1868; 57,737 in favor of and 39,076 against ratification. For an account of the condition of Louisiana at this time and of the acts of violence committed, etc., see Executive Document No. 20, House of Representatives, 40th Congress, First Session.

In Virginia there was a larger registration of white than of colored voters.[1] As elsewhere in the South, few whites and practically all the blacks voted for a convention.[2] Nearly a quarter of the delegates chosen were colored men, and the majority were Republicans.[3] Political sentiment in the State was divided on the same lines as in New York, in Michigan and in Louisiana. The conservatives declared themselves friendly to the black population, but emphasized as their cardinal principles "that the government of the States and of the Union was formed by white men to be subject to their control," and that each State should regulate it under the exclusive direction of the white race.[4] The Republicans in political convention at Richmond in September demanded "a full recognition of the principles of political equality for all men, without distinction of race or color," and they assembled in constitutional convention at Richmond on the third of December.[5] Of chief interest to the delegates were the extension of the franchise and the tests and qualifications for office. The majority report of the Committee on the Franchise gave the right to vote to every male citizen of the United States of the age of twenty-one, who had resided in Virginia six months, and one month in the county, city or town in which he would wish to vote. This practically would enfranchise every negro of age in the State. Disqualifications prescribed in the Fourteenth Amendment

[1] 120,101 whites; 105,832 colored. Document No. 50.

[2] October 22; for the convention, 92,507 blacks and 14,835 whites; against it, 61,249 whites, 638 blacks. Document No. 50.

[3] Eighty whites and 25 colored delegates, of whom 35 were Conservatives and 70 were Republicans.

[4] See the resolutions of the Conservative State Convention at Richmond, December 12, 1867.

[5] See its Debates and Proceedings, December 3, 1867-April 17, 1868, Richmond; printed at the office of the "New Nation," 1868, Vol. I, 750 pages. Journal, 391 pages, and Documents, 310 pages.

and in the reconstruction acts should be incorporated in the new constitution, and this would exclude nearly every intelligent white man in the State from holding office.[1]

The minority protested against this prospective negro domination, and, in an elaborate report, appealed for support to the teachings of the fathers, to the practice of the Commonwealth and to the incapacity of the negro to perform civil duties by reason of his lack of intelligence and moral culture. The granting of universal suffrage to the negro, so concluded their expostulation, and the sweeping disfranchisement of the whites, would sow the seeds of dissension, strife and war in the State.[2]

But the minority were powerless.[3] An ordinance was passed that the election, for the ratification of the constitution, should be held on the second of June, 1868,[4] but the ordinance was not carried out; the constitution was not acted upon and Virginia continued under military government.

Six days after the assembling of the Virginia convention, that of Georgia met at Atlanta.[5] The registration of

[1] See the report of the Committee, Documents Nos. 29 and 34.

[2] Document No. 37. For a brief account of the outrages in Virginia in 1869, see Executive Document No. 95, House of Representatives, 40th Congress, Third Session.

[3] The Constitution was adopted as a whole by the delegates on the 17th of April, 1868, by a vote of 61 to 36.

[4] Journal, p. 377.

[5] See the Journal of the Proceedings of the Constitutional Convention of the People of Georgia, held in the city of Atlanta, in the month of December, 1867, and January, February and March, 1868, and the Ordinances and Resolutions adopted. Augusta, Georgia: E. M. Pughe, printer; 1868, 636 pages. Of the members of this convention 79 were natives of Georgia, 19 of South Carolina, 12 of North Carolina, 7 of Virginia, 5 each of New York, Pennsylvania and Maine, 4 of Vermont, 3 each of Massachusetts and Tennessee, and 2 each of New Hampshire, New Jersey, Ohio, Kentucky, Ireland and Scotland, and 1 each of Connecticut, Maryland and Alabama. Journal, pp. 611-613.

voters was nearly equal for the two races.[1] The vote for a convention was almost unanimous,[2] but nearly half the white electors abstained from voting. Thirty-three of the one hundred and sixty-six delegates chosen were negroes. Many of the delegates wished to treat the State as a territory,[3] though the suggestion called forth vigorous protests,[4] but others would have the convention act as a sovereign body and promulgate a constitution. A few spoke of Georgia as a conquered province.[5] Propositions of little practical importance, save as straws in the wind, were submitted: as to repudiate the obligations of the State incurred in aid of the Confederacy; to exclude from the right of holding office negroes and all persons who could not read the Bible and the State constitution. However, the reconstruction acts were a ballast which kept the convention steady in its course. The hope of the minority lay largely in securing an educational qualification for voters,[6] as it would practically exclude all the blacks and many of the poor whites. But no disqualification of the kind could be adopted, and the article on the franchise and elections which made no discrimination between the races, differed from that in the constitutions of Alabama, Louisiana and Virginia, only in being less severe on the whites who had been in any way identified with the Confederacy.[7] But the Georgia constitution had yet to receive

[1] September 19, 1867; 188,671 voters, of whom 98,323, a small majority, were whites.

[2] At the election October 29-November 2, 102,283 votes were cast for a convention and 4,127 against it.

[3] Journal, 49.

[4] Journal, p. 175.

[5] Journal, 681.

[6] Journal, p. 279.

[7] At the election in April, the majority for the Constitution was 17,982; see Executive Document No. 300, House of Representatives, 40th Congress, Second Session.

the approval of Congress. It provided that the debts due before the first of June, 1865, as well with loyal as disloyal men, should be null and void,[1] and it might well be questioned whether this article would not endanger the whole constitution.

The registration of voters in Arkansas closed on the last day of August with a total of nearly sixty-seven thousand, of whom one-half were whites.[2] The question of holding a convention was decided on the second of November, by a majority of fourteen thousand votes.[3] Nearly all the seventy-five delegates chosen were of the Radical party; eight were negroes, and only nine were natives of Arkansas. They assembled at Little Rock on the seventh of January.[4] The membership was even more composite than that of the California convention of 1849, and, in their nativities, the members represented twenty-one States and countries.[5] From the beginning of the session a vigorous and highly

[1] Article V, Section 17, adopted March 2, 1868; 73 yeas to 37 nays. Journal, pp. 446-459.

[2] Official Returns, 66,805 registered; whites, 33,047. See Appendix to Debates and Proceedings of the Arkansas Constitutional Convention, p. 769.

[3] For the convention, 27,576; against it, 13,558; Id. p. 77.

[4] See Debates and Proceedings of the Convention which assembled at Little Rock, January 7, 1868, under the provisions of the act of Congress of March 2, 1867, and the acts of March 23 and July 19, 1867, supplementary thereto, to form a Constitution for the State of Arkansas. Officially, John G. Price, Secretary, Little Rock: J. G. Price, Printer to the Convention, 1868; octavo, 985 pages. This is perhaps the best edited report of a Constitutional Convention extant.

[5] Nine were natives of Arkansas; 13 of Tennessee; 6 of Alabama; 6 of North Carolina; 4 of Ohio; 3 each of Pennsylvania, New York and Kentucky; 2 each of Indiana and New Jersey; 1 each of Massachusetts, Illinois, Iowa, Virginia, Maryland, Georgia, South Carolina, District of Columbia, Canada, England and Scotland; the nativity of 16 is unknown. By occupation, 22 members were farmers, 19 lawyers, 9 physicians, 9 ministers, 4 mer-

intelligent minority opposed the extension of the suffrage to the negro. To this end they wished to continue the constitution of 1864 and to submit it to the people for ratification.[1] It granted civil rights to the African and he, they asserted, was not qualified to enjoy more. But a negro delegate, speaking for his race, demanded for it all the rights of citizens who had "stood by the Government and the old flag in times of trouble, when the Republic trembled with the throes of civil war." The rights of citizenship recognized by the reconstruction acts of Congress must be engrafted on the organic law of Arkansas. Its constitution of 1864, he said, did not secure a republican form of government. The assertion that the negro could not become a citizen was contradicted by the history of the franchise in every State in the Union except South Carolina.

At the time of the recognition of the independence of the United States, British subjects had become American citizens, and the negro was then a British subject. The constitution, which the Conservative members wished to adopt, forbade negroes or mulattoes to come within the limits of the State except by military authority. For every negro voter registered there was a white man who

chants, a mechanic, a laborer, an engineer, a manufacturer, one negro (postmaster); 3 of the negro members were farmers and 4 ministers. The delegates who were natives of the Northern States had resided in Arkansas from three to five years. Among the most efficient members was Clifford Stanley Sims, a native of Pennsylvania, a delegate from Desha county. He was a member of all the principal committees, and was chairman of the committee on the legislative department. The arrangement and phraseology of the Constitution adopted were largely due to him. At the time of his death, in 1895, he was a Judge of the Court of Errors and Appeals of New Jersey.

[1] An ordinance to this effect was rejected by a vote of 53 to 10; Debates, p. 157.

could neither read nor write, and, as compared with the same number of whites throughout the South, were not the negroes equally qualified to exercise the suffrage? The judicial decisions which had excluded the negro from citizenship were "outside of the constitution." Their mistakes had been remedied by the war. The strenuous opposition of the white race to the black had its parallel in the antipathy of the Cavaliers of England to the Yeomanry who followed Oliver Cromwell. The negro in possession of the franchise could protect his own. The right was demanded as an incentive to industry and education and the new constitution must recognize it as the price of restoration of the State to the Union.[1]

It was something of a novelty in Arkansas to have negro delegates in a constitutional convention, and the local papers, expressing ultra-conservative sentiments, referred to the convention as "the menagerie."[2] After a few days of parliamentary altercation and preliminary adjustment, the delegates settled down to work. The majority were resolved on securing equal political rights for all; the minority were equally resolved to prevent this catastrophy, whether by parliamentary obstruction or otherwise. But the state of parties in Arkansas was conditioned by the acts of Congress, and the conclusion of the whole matter was practically forestalled. The long debate on the suffrage question remains the most complete register of Southern opinion on the subject at the time; but as the means to a predestined end it was quite superfluous. The negro was told that no republican form of government had ever been established

1 William H. Gray, a minister, and a native of the District of Columbia, and representing Phillips county. He was the ablest negro member of the convention.

2 Debates, p. 100.

except by the Caucasian race and that, after eight hundred years of work, his race was not yet qualified to possess the privileges of a citizen. Wherever he had tried self-government, the experiment had ended in crime and anarchy. Even the Republic of Hayti, established by mulattoes and runaway slaves from the South, became the most corrupt of petty empires under Soulouque and the yet more bloody Geffrard.[1]

Slavery had been a curse to the whites, but freedom would prove a curse to the black race. Deprived of the protection of the white man, his guardian and friend, the negro was destined only to sink lower in misery and degradation. That he was not a citizen was evident from the proposed Fourteenth Amendment, one of whose principal purposes was to declare him a citizen. Even if he possessed the elective franchise in Arkansas, he would not thereby have the right to vote in other States. Massachusetts excluded him, unless he could read. What right had Congress to force universal suffrage upon the State? Arkansas, as a State, had already rejected the amendment, and Congress had recognized the rejection as a State act.[2] The constitution and State government of 1864 had been framed under the direction of Abraham Lincoln; had been acknowledged by the various departments of the general government,[3] and the State had invested funds in United States bonds[4] and held them as a recognized State government. This violation of principle by Congress was continued by the presence of the army. The new principle of the right of Congress, to interfere in the domestic government of a State, was not the principle for which Union men of the South had fought. They protested against this attempt to dictate to the people of a

[1] Journal, 115-117.
[2] Debates, 125-126.
[3] Debates, 141-153.
[4] Debates, 75-86, 231, 734-760.

State what manner of Constitution they should form; but, yielding to military power, they recognized that the Fourteenth Amendment must be adopted and also a constitution which would give the negro the right of suffrage.[1]

But no less hostile was the feeling of the minority to the disqualifying clauses of the restriction acts and the proposed amendment; however, they could do no more than freely express their opinions.[2] Clearly was it not the sole motive of Congress, in giving the negro the right to vote, to control those lately in rebellion?[3] Why should it ask the State of Arkansas to do that which the States of New York, Michigan and Ohio had refused to do? In these States the negro was better educated than in Arkansas, yet on a distinct issue their people had lately refused to extend the suffrage to him. But the disqualifying clause was even more harmful to the South than the extension of the suffrage, for it excluded intelligence from the public service.

At this point, a radical member called the attention of his colleagues to a fact, well known to every loyal man in the country, that the elective franchise could not safely be restored to those disqualified under the acts of Congress without danger of undoing all that the war had done. Exclusion was simply a matter of safety.[4] Congress, acting on behalf of the freedmen and the loyal whites, could not, in justice, permit the disloyal, however intelligent, to return to office and to control public affairs. Yet, to distrust a man is to make him an enemy, and to enforce the disqualification prescribed by the reconstruction acts and the proposed amendment, was to convert every intelligent white man in the South, who had been in any way identified with the rebellion, into a dangerous and implacable

[1] Debates, 128.
[2] Debates, 237 et seq.
[3] Debates, 147.
[4] Debates, 238.

foe to the General Government. This ominous fact the minority again and again pointed out. As in every other southern State, they declared that these men were anxious to heal over the terrible wounds of war, to accept the political situation, and to give their unqualified allegiance to the United States. If it would trust them freely, they would become the most efficient agency in restoring the South to its old-time federal relations. They asked no more than the opportunity to prove their loyalty. Therefore, let Congress recall the ban against them; and allow them, as it did their equals in the North, to participate in State affairs, and the South would speedily prove the peer of the North in loyalty, domestic peace and prosperity.

Though the war was over, the counter-revolution which followed it was not, and the radical members of this convention, as in those of other southern States, were not persuaded that the men, who were the objects of political disqualifications, could not be trusted. The article on the elective franchise which they reported fully reflected this distrust. It granted manhood suffrage and incorporated the disqualifying provision of the reconstruction acts and of the Fourteenth Amendment.[1] It was reported on the sixth of February, and, on that day, the minority filed a protest in a report which more completely sets forth the feelings of the majority of the white men of the South at this time on the subject than any other on record. The negro, they said, was not the equal of the white man. The differences between the two races in body and mind were numerous, striking and insurmountable. The negro had not changed in four thousand years. All history demonstrated his incapacity for self-government, and his utter want of appreciation of every institution. To this dreadful conclusion the teaching of history and especially the

[1] Journal, 512.

experience of the white people of the South pointed inexorably. To invest an inferior race with social and political equality would be but a stepping-stone to miscegenation, and the consequent utter deterioration and degeneracy of the race.[1] The equity which must result from the indiscriminate exercise of the elective franchise must result in social equality unless, in the throes and conflicts which would inevitably precede the new order of things, one or the other of the races did not perish from the earth. So marked and odious a change could be effected only after the natural and God-given prejudices of the white race had ceased to exist. Peace and prosperity could never result from measures so utterly at war with the instincts and fears of the white people. To invest the negro with the elective franchise would not shield him from oppression or wrong, but would "only aggravate and increase the prejudices of race and precipitate a civil and social war.

It was a slander to assert that the whites would not accord impartial justice to the negro, or that he would not enjoy the requisite protection for person, property and reputation unless invested with the elective franchise. The whites sincerely desired his social, intellectual and religious improvement. If, in the course of a few years, he should demonstrate his fitness for the exercise of the right, which in many highly civilized and well-governed countries was denied to a large class of citizens, it would then be time enough to discuss the propriety of putting the ballot into his hands. To give it to him now would only fit him to be "the facile tool of wicked and designing speculators" and to suffer him to embark on the stormy sea of politics would only retard his progress in civilization. For these reasons the right to vote should be limited to

[1] A large part of the discussion in this convention was on the intermarriage of the races.

white citizens.[1] But by a vote of nearly four to one the convention rejected the proposition.[2]

The constitution finally adopted, by a vote of more than two to one,[3] contained several provisions which were innovations in Southern policy. No change was more radical than the statement in its Bill of Rights of the doctrine of paramount allegiance to the Federal Government and of the constitutional right of the United States to employ armed force in compelling obedience to its authority, provisions transcribed almost literally from the constitution of Nevada, and first promulgated, it will be remembered, by the Republican party when it renominated Abraham Lincoln at Baltimore in 1864.

Liberal provision was made for a system of free public schools open to all the children of the State alike, though the article on education was adopted after most bitter opposition. The minority, whose hostility to the new constitution did not cease with its adoption, filed their protest in various resolutions. The constitution, they declared, was not republican in form; it was proscriptive and would destroy the dearest rights of the people of the State; it disfranchised a large number of the best white citizens and enfranchised a class, totally incapable of self-government; if ratified, it would deliver the political control of the State to stolid and brutish ignorance; it encouraged the social equality of the two races; it compelled the white citizens to contribute by taxation to the support of public schools from which their children would be effectually excluded, and yet it relieved from taxation almost the entire negro population. The acts of Congress under which the convention had been held, they asserted fur-

[1] Debates, 514-517.
[2] 50 to 13, Debates, 517.
[3] 45 to 21, Debates, 656-657.

ther, were unconstitutional and Arkansas was declared to be a State in the Union with a government republican in form, and consequently entitled to representation in the National Legislature. A new constitution, it was claimed, was not necessary.[1]

The election for the ratification of the constitution began on the thirteenth of March and continued eighteen days: continuance over so long a time permitting much confusion and many frauds. The Republicans were accused of illegal and fraudulent voting. The final returns showed that the constitution had been adopted by a majority of about thirteen hundred in a total vote of over fifty-four thousand.[2] The compulsory measures, known as the reconstruction acts, had borne speedy fruit. They had brought about the adoption of the amendment.

[1] Debates, 665-666.

[2] For the Constitution, 27,913; against it, 26,597. See Executive Document No. 278, House of Representatives, 40th Congress, Second Session, p. 4.

CHAPTER III.

THE FOURTEENTH AMENDMENT RATIFIED.

In Mississippi the number of blacks greatly exceeded that of the whites in the registration of voters.[1] At the election, on the fifth of November, nearly seventy thousand votes were cast in favor of holding a convention,[2] and one assembled at Jackson on the same day with that of Arkansas.[3] It is doubtful whether a majority of the delegates believed either in the constitutionality of the convention or of the reconstruction acts of Congress, but they believed that a convention was a sovereign body. They sent a memorial to Congress expressing their loyalty to the General Government, and, on the ground that the Union men of Mississippi would control its policy, they petitioned that the convention might be allowed to declare all the civil offices in the State vacant, and to fill them with loyal men of its own choosing.

The matter of chief interest to the convention was the article on the elective franchise, and efforts, essentially like those recently made in Arkansas, were put forth to exclude the African from exercising the suffrage. The article, which was like that in Arkansas, was finally adopted by a vote of nearly two to one.[4] It gave the right to vote to male inhabitants of the State irrespective of race, and disqualified all who were excluded by the reconstruction acts; but the minority, when the vote was made known, went further than their brethren in Arkansas, by

[1] 60,167 blacks; 46,636 whites.

[2] For a convention, 69,739; against one, 6,277.

[3] For the official record, see its Journal and Ordinances, January 7 to May 18, 1868; 776 pp.; Jackson, 1871.

[4] 44 to 25.

promptly resigning their seats. Lest the Legislature might at any time undo the work of the convention, the constitution, in its Bill of Rights, was made to forbid any requirement of a property qualification for eligibility to office, or of an educational qualification to become an elector. The preponderance of negro voters in the State compelled a sharper alignment of parties than elsewhere in the South, and before the convention adjourned, the Conservatives began an active campaign against the ratification of its work. They proceeded on the assumption that the convention was without authority and that the constitution which it had framed would disfranchise and degrade the people of the State. So intense was the agitation, the whole State seemed to be one vast mass-meeting. The Radical party lacked organization and was far less active than the Conservative in its canvass. The result, on the twenty-second of June, was the rejection of the constitution by a majority of nearly seven thousand votes.[1] This practical refusal to comply with the late acts of Congress continued the military government established by that body, and the State was treated by Congress as if no convention had been held. The Republicans of Mississippi claimed that if it had not been for intimidation and fraud, the constitution would have been ratified, and appealed to Congress to set aside the result of the election and to recognize the Republican candidates who had been chosen to the various civil offices in the State,[2] as lawfully elected.

In North Carolina the white outnumbered the black electors.[3] A constitutional convention was chosen in

[1] 63,860 against ratification; 56,231 for it.

[2] See the resolutions of the Republican Convention at Jackson, November 25, 1868.

[3] By the registration completed during August, 1867, there were 106,721 white voters and 72,932 black: Journal, pp. 114-118.

November, and among its delegates were thirteen negroes.[1] It met at Raleigh on the twelfth of January[2] and the minority immediately recorded their protest against the course of affairs and pronounced the reconstruction measures unconstitutional, unwise and oppressive. The white and black races, they said, were distinct by nature, and it was a crime against God and the civilization of the age to attempt to abolish the distinctions between them, and degrade the white race to the level of the black. White men had instituted the Government of the United States, and of the Southern States, and should control them; at the same time, by just laws, protecting the lives, liberty and the property of the negroes. They appealed to the sense of justice in the people of the North to save the intelligent citizens of the South from the degradation about to be heaped upon them, if the policy of depriving eight millions of whites of the services of statesmen of their own race and transforming the political power to ignorant blacks was to be continued.[3] The minority, however, was powerless, save to protest. The convention refused to discriminate between whites and blacks by requiring a separate organization of white and colored persons in the militia,[4] and by declaring all able-bodied male citizens of the State liable to militia duty, they made the constitution of North Carolina, more equitable in this respect than that of any Northern State. Henry Wilson,

[1] Of the 93,006 votes cast for a convention, over 60,000 were by negroes; the number of votes against a convention was 32,961.

[2] See the Journal of the Constitutional Convention of the State of North Carolina at its session, 1868. Raleigh: Joseph W. Holden, Convention Printer, 1868; 488 pages. Its Ordinances and Resolutions; 129 pages. Among the delegates were General J. C. Abbott, A. W. Tourgee, and George A. Graham.

[3] Journal, 33.

[4] Rejected by 83 votes to 9. Journal, 175.

in a speech in the United States Senate, pronounced it "the most republican constitution in the land."[1]

The doctrine of paramount allegiance to the Constitution and Government of the United States was accepted,[2] and the right to vote and to hold office was given to all men, irrespective of race. Against this innovation the minority protested. The right to vote, they said, was neither natural nor inherent, but conventional only, and should be regulated in such a way as would best promote the welfare of the whole community. Upon this principle women and minors were excluded, and should the negro be advanced higher than they? While a few individuals of the race might be permitted to express their convictions at the ballot box, the great mass were so ignorant as easily to become the dupes of designing adventurers and demagogues and of their secret associations introduced from the North. Following their instructions they would reflect the views of their political masters. To give the right to vote to persons mentally and morally unfit to exercise it must endanger the safety of republican institutions. But was not the proposed alteration, demanded by Congress, necessary to restore the State to constitutional relations with the federal government? Certainly it was a singular demand that North Carolina should extend the elective franchise to persons so inexperienced and little prepared for the ordinary business of life that the government deemed it necessary, through the Freedmen's Bureau, to exercise supervision and tutelage over them. Moreover, Congress had no power to prescribe to North Carolina who should or who should not vote, as this has always been recognized as one of the great rights reserved to the States. Had not Congress recognized North Caro-

[1] Globe, May 30, 1868, p. 2691.

[2] Declaration of Rights, Section 5.

lina as a State in proper constitutional resolutions, when it ratified the Thirteenth Amendment in 1865, and, recently again, when it proposed the Fourteenth? The present measures, then, could only be regarded as a punishment for rejecting the last amendment. Was not legislation of this kind *ex post facto,* tyrannical and unjust? North Carolina should not be degraded to a position inferior to that of her sister States, by thus expunging from her constitution clauses that excluded the negro from voting or holding office, while other States—and five at the North by recent vote—had indignantly refused to strike the exclusion from their own.[1] The requirement would come with much better grace from Congress, if these and other States had altered their constitutions on behalf of the negro, or if it was proposed to so amend the Constitution of the United States as to make the application universal.

While willing to extend to the negro population every right that would legitimately result from the war, or was necessary to their security and happiness, yet, it was believed, that the welfare of both races would best be promoted by continuing the constitution of the State unchanged. Was not the whole scheme of reconstruction intended to advance party purposes, in expectation that the States of the South, by being Africanized and given over to the Radical party, might more than counterbalance its loss of electoral votes in other sections of the Union? Therefore the State should refuse to alter its constitution at the dictation of Congress, and if negro suffrage and negro equality were forced upon it, at least by refusing assent, preserve its honor and self respect.[2]

[1] The reference was to New York, Pennsylvania, Ohio, Indiana and Illinois.

[2] Journal, 235-238.

This expostulation was suffered at the time to go unanswered, but later the majority made a formal reply in the address to the people of the State, accompanying the constitution. In giving suffrage to the colored people, so ran this address, the constitution was consistent with the principles of republican government by not denying the suffrage to any portion of the whites. Was it not an indubitable monument to the wisdom, equity and magnanimity of the Union people of the State, that, in three years after the close of a bloody and devastating civil war, in which wrongs and outrages were committed that could never be forgotten, they had formed a constitution in which no trace of animosity or vindictiveness could be found? All who were now true to their country were invited to participate in its government. The charge that the constitution favored a social equality of the races was untrue. "With the social intercourse of life, government has nothing to do; it must be left to the taste and choice of each individual." The constitution left it to the legislature to arrange the enrollment in the militia companies, and to provide for the education of all white and colored children in free public schools. The two races in the State were destined to live on the same soil and "ought to live together in peace."[1] The elective franchise was conferred upon the male persons of both races, duly qualified, and there was no attempt to make the disqualifying clauses of the new constitution more rigorous than those of the reconstruction acts. At the election in April, the work of the convention was approved by a majority of nearly twenty thousand votes.[2]

The registration in South Carolina, which was completed by the middle of October, showed nearly twice as

[1] Journal, 484-485.

[2] For the Constitution, 93,118; against it, 74,009.

many blacks as whites.[1] On the nineteenth and twentieth of November, delegates were chosen to a constitutional convention, all the blacks voting for a convention and the few whites who voted, some two thousand in number, voting against it.[2] Nearly two-thirds of the delegates were negroes.[3] The spectacle was a curious one. In the State of South Carolina, which a little over eight years before, had launched the secession movement in a convention of slaveowners, there now assembled to form a supreme law, a body of men, nearly two-thirds of whom were negroes, and perhaps more than one-half of whom could testify that they were once held as slaves.[4] It is not improbable that some of the delegates to the convention of 1868 were former slaves of some members of the convention of 1860.

Never before in the history of the world had men of the African race thus assembled to form a constitution of government. The anomaly was the more striking in this case because their handiwork would be supported by Congress, and would be forced upon the white people of South Carolina by the overwhelming vote of men who had just emerged from slavery. The convention met at Charleston on the fourteenth of January.[5] Of the delegates, three had been members of the "restoration convention" of 1865.[6]

[1] 78,982 blacks; 46,346 whites.

[2] For a convention, 68,876 blacks, 130 whites; against it, 2,081 whites.

[3] 63 negroes and 34 white men.

[4] Proceedings of Convention, 199.

[5] See the Proceedings of the Constitutional Convention of South Carolina held at Charleston, South Carolina, beginning January 14 and ending March 17, 1868, including the Debates and Proceedings, 2 Vols., 926 pages: Charleston, South Carolina; printed by Denny & Perry, 163 Meeting street, 1868.

[6] Alexander Boyce; Dr. L. B. Johnson, of Pickens; F. J. Moses, Jr., of Sumter.

But most of them had no experience whatever in public affairs. The complexion of the convention afforded an easy subject for caricature, which some of the conservative newspapers of the State did not delay to improve. The Charleston Mercury's repeated burlesque of the proceedings of the convention, which it persistently referred to as "the menagerie," for a time greatly disturbed many of the delegates, who, though earnestly expostulating against the indignity of their treatment, set an example of good temper, entered upon their work and ignored the abuse which was constantly heaped upon them.[1] The negro members well knew that only the strong arm of Federal power prevented the white men of the State from breaking up the convention.

The real sentiments of the whites toward them was guardedly, but clearly enough, expressed in the address to the delegates by the provisional governor of the State, James L. Orr, on the opening day. The reconstruction acts of Congress, he said, had become a law of the land and discussion of their constitutionality or wisdom was of no further moment. The white population had almost unanimously abstained from voting at the late election and, therefore, the convention represented only the colored people of the State. "This being the case," said the governor, "it cannot be denied that the intelligence, refinement and wealth of the State is not represented by your body." Yet, true to the political traditions and practice of the South, he declared that he regarded the convention "as invested with sovereign power of the State;" and he prophesied truly that the constitution, which it might adopt, would be accepted by Congress, and be the supreme

1 Proceedings, pp. 30, 107. The representative of the Mercury was finally excluded from the convention; pp. 181-183, 642-643.

law of the State for many years to come.[1] Little did he imagine, that, though made principally by negroes, it was destined to survive all the other reconstruction constitutions. He anticipated a counter-political revolution at the North by the force of which all the odious reconstruction acts of Congress would be repealed; therefore the delegates should consider the end, knowing that their work, if not soon revised by a more capable convention, would, at least, speedily be administered by white men. The negro, therefore, could well afford to be magnanimous, for the day of reckoning would come. He should not exclude the real intelligence and experience of the State from her counsels "by disfranchising the whites and thus attempt to inaugurate a retaliatory policy." The elective franchise should not be given to the illiterate or those absolutely without property. The negro, now in the day of his power, should not confuse his duty to his State with his prejudice in favor of any national party. The old relation between the two races had ceased, and there was no reason why any man, white or colored, should be excluded from the privilege of voting or holding office. "The doctrine of State rights," said the governor, "as taught in South Carolina, has been exploded by the war; the allegiance of the citizens, according to the results of that controversy, is due to the Government of the United States and not to the State."[2] The unhappy condition of affairs in Georgia and Alabama should be a warning to the delegates. If they adopted an obnoxious and unjust constitution, such as no white man could live under, it would

[1] It continued in force till supplanted by the constitution of 1895.

[2] This extraordinary language from a Southern man, in 1868, was embodied, almost verbatim, in the constitution of South Carolina, 1868, Bill of Rights, Sec. 4, and that of Mississippi, 1890, Bill of Rights, Sec. 7.

compel the intelligent men of the State to emigrate. Though the black population outnumbered the white by one hundred and twenty thousand, it could best afford to be magnanimous, for if the delegates should attempt proscription and injustice, there would be a continual war between the two races which must result in bloodshed.[1]

No delegate openly resented the governor's words, but some of the colored members remarked that the value of the governor's advice, however great, should be measured perhaps in inverse relation to his prominence in the convention, which, eight years before, had issued the ordinance of secession, for he was a member of the committee of seven which reported the draft of that ordinance.[2] All the reconstruction conventions had to overcome, in some way, the obstacles of a broken public credit. Each convention had authority, under the reconstruction acts, to levy a special tax for its expenses. There was little money in circulation and the bills receivable of the State of South Carolina were, with difficulty, circulated at seventy-five cents on the dollar. The convention, therefore, was soon absorbed in the attempt to solve the problem of paying its expenses. Should they issue bonds and attempt to negotiate them in Boston and New York, at the best rate possible for greenbacks? Would not the Northern friends of the freedmen be willing to lend the State money at seven per cent? But the members doubted this and believed such a step imprudent, because Northern capital had not yet begun floating southward for investment.[3] The fiat character of the money in circulation compelled the mem-

[1] Proceedings, 45-55.

[2] Journal of the Convention of South Carolina held in 1860, 1861 and 1862, 23.

[3] Proceedings, 155.

bers to vote themselves a daily allowance, which, in a State whose financial system was sound, would have seemed excessive. Nine dollars a day might appear an extravagant price for a delegate's services, unless the public knew, as did that of South Carolina, that the amount was scarcely equal to five dollars in gold. The amount was finally fixed at eleven dollars[1] with mileage, by the usual mail route, of twenty cents per mile to and from the convention. The apparently high pay which the delegates fixed for themselves intensified the hostility of the white population toward the convention and was the foundation for the belief, soon widely accepted, that the negro delegates were robbing the State treasury.

The convention was greatly tempted to assume legislative functions. The terrible depression of trade and industry in the State clamored for relief, and, particularly, the condition of the freedmen suddenly thrust upon themselves without land, occupation or friends. The form of relief most seriously discussed, as in adjoining States, was the passage of a stay-law, or homestead act, which should secure a piece of land to the freedmen whatever his indebtedness. This form of public immorality was not without precedent in the northern States, for Michigan in 1850 had established it. The whites in the State feared for a time lest the convention would confiscate their property and turn it over to the negroes, but no delegate suggested such an act of violence. When we consider the superior numbers of the negroes, and the fact that they had control of the State, and further, that every negro who was capable of reflecting on his condition believed that he had been the victim of ages of wrong, it is to the lasting credit of the race that now, in its moment of triumph, it did not enter upon a general proscription against the

[1] Proceedings, 177-189, 204.

whites. On the contrary it set an illustrious example which the whites have since rarely followed in their treatment of the negro. Occasionally the vote on a measure divided strictly along the racial line, as on the ordinance declaring null and void all contracts and judgments in which the consideration was for the purchase of slaves. For such an ordinance every negro delegate voted aye.[1]

A constitution was reported on the fifth of February,[2] containing many provisions which attested the completeness of the political revolution through which the State had passed. In its Bill of Rights, it forbade slavery; declared that the citizens of South Carolina owed paramount allegiance to the Constitution and Government of the United States;[3] that the State should ever remain a part of the Union; and that all attempts to dissolve it ought to be resisted with the whole power of the Commonwealth. Rejecting the advice of Governor Orr, it prohibited a property qualification for the voter or the officeholder. It provided for a system of public schools, open to all the children of the State, "without regard to race or color," and made it obligatory upon the general assembly to provide for the maintenance of higher institutions of learning.

The opening words of the new instrument, "All men are born free and equal," precipitated a debate on the exact meaning of the statement. In many discussions before this time white men had debated whether the words applied to the black race, but now, and for the first time, negroes were discussing its meaning for themselves. They, however, added nothing new to the interpretation, and perhaps, contrary to what might be expected, they did

[1] Proceedings, 248-249.

[2] Proceedings, 255-256.

[3] It is not found in the constitution of South Carolina of 1895.

not claim that the words were intended to recognize natural, equal political privileges among men.[1]

It was agreed, quite unanimously, that the right to vote and to hold office should be without discrimination on account of race or color.[2] Some of the delegates were anxious that civil and political privileges should be granted to their race by the constitution in such a way that no lawyer, however cunning or astute could possibly misinterpret the meaning. Colored men had been cheated out of their rights for two centuries; their opportunity had now come; nearly all the inhabitants of the State were ready, at any moment, to deprive the race of these rights, and "no loophole should be left that would permit them to do it constitutionally."[3] The insistence of the colored delegates on this point led to the definition of the right of suffrage at last adopted, that every male citizen of the United States and of South Carolina, "without discrimination of race, color or former condition," should, if otherwise qualified, be entitled to vote.[4] The distrust of the white race shown by the negro members was as pitiful as it was well grounded. Perhaps, if the negroes of the South had realized their power at this time, they would have appropriated the public lands of the southern States to members of their race, in severalty, if they did not confiscate the land of all who had borne arms against the general government. There was a widespread, childish belief among the negroes that they were to receive land grants from the United States, and farming tools and stock wherewith to cultivate them. Doubtless this delusive expectation made the negroes magnanimous toward their former masters. The natural timidity of the race, in the presence of the whites, saved the South from the

[1] Proceedings, 268-269.
[2] Proceedings, 355.
[3] Proceedings, 254-255.
[4] Article VIII, Section 2.

miseries of a proscription. For a time it seemed that an educational or a property qualification might be required of the voter,[1] but all arguments for either, and they were brief, were in vain. The negro delegates promptly characterized them as devices to deprive members of their race of their rights, and they were rejected as they had been rejected in Mississippi, for this reason. No argument could equal in force the pitiful plea of one negro member that his race had been debarred from the rights of voting and education for ages, and he was now determined it should exercise them.[2]

As in North Carolina the militia was declared to consist of all able-bodied male residents between the ages of eighteen and forty-five, and a more generous definition could not be found in any constitution north of Mason and Dixon's line. The Jeffersonian idea, that the actual exercise of the rights of citizenship is the best training for the citizen, was exploited to the full. Let it be granted, said one negro delegate, that the negro was inferior to the white in knowledge of public affairs and public duties, but give him as fully as the white man the privileges of participating in government and he would "take a forward bound toward humanity," and become a capable and trustworthy citizen.[3] Upon the sound basis of universal suffrage, said another, South Carolina could be wheeled into line with the other States of the Union. Moreover, any attempt to abridge the right to vote would endanger the ratification of the constitution and delay the return of the State to the Union.[4] A proposition to require the voter, after 1875, to be able to read and write, was rejected almost unanimously.[5] The constitution at last

1 Proceedings, 724.
2 Proceedings, 826.
3 Proceedings, 830-831.
4 Id. 833.
5 107 to 2: Proceedings, 834.

worked out by the convention was adopted without a dissenting vote.[1] The appeal of Governor Orr that the convention should be magnanimous had not been made in vain. It did not add to the rigor of the disqualifying clause in the reconstruction acts and the proposed Fourteenth Amendment, but left the subject of disqualification wholly with Congress. This relatively generous treatment of the white population of the State, and almost without exception it had been identified with the Confederacy, goes far to explain the long lease of life to which this constitution was destined.

Before the convention adjourned it transformed itself into a political body and nominated candidates, on the Republican ticket, for all the State offices. With one exception these were all taken from its own body. On the third of April, the Democratic Convention at Columbia nominated a ticket. On the fourteenth, fifteenth and sixteenth, the election was held; the constitution was ratified by a majority of over forty thousand votes,[2] and the Republican candidates were elected.

In Florida, the registration was completed by October and showed a majority of over four thousand colored votes,[3] and the question of a convention was carried almost unanimously in the three days' election ending on the sixteenth of November.[4] Among the delegates were seventeen negroes. The convention assembled at Tallahassee on the twentieth of January.[5] The reconstruction

1 Proceedings, 923.

2 For the constitution, 70,758; against it, 27,288. The total registration was 133,597.

3 11,148 whites; 15,434 colored. The white vote, in 1860, was 13,980.

4 For a convention, 14,300; against it, 203.

5 See Journal of the Proceedings of the Constitutional Convention of the State of Florida; begun and held at the capitol at Tallahassee: Edmund M. Cheney, Printer, 1868; 134 pages.

party in the State was hopelessly split into factions, and the struggle between them for the control of the convention nearly caused its dissolution several times. The minority claimed that they were the victims of gross frauds in the apportionment, and of notorious iniquities at the polls. The issue between the factions came to a point at last on the question of the eligibility of four of the members. The contest exhibited the somewhat uncommon spectacle of a majority constitutionally outwitted and outmaneuvered by the minority. In consequence, when the convention adjourned on the first of February, for three days, fifteen of the majority withdrew, in a body, from further attendance.

Though no quorum was present, the minority continued the session to the eighteenth, meanwhile requesting the Federal commander at Tallahassee, Colonel F. F. Flint, to arrest the absentees and to compel their attendance. There were now only twenty-two delegates present and their meeting had become a mere rump convention; but they declared a legal quorum present, continued their work and made a constitution for the State. One of the clauses suggested resembled that one offered in the Louisiana convention, to secure equal rights and privileges to all persons, irrespective of color, while traveling in the State in public conveyances, or in attending places of amusement or instruction.[1] To the negroes these rights were almost as much to be desired as those of voting and holding office. But it was concluded that the subject could come more properly before the legislature. On the eighth of February the twenty-one delegates completed their work, put their names to the new constitution and sent an authenticated copy to General Meade. They then adjourned until the fifteenth.

[1] Journal, 23.

The fifteen delegates who had withdrawn and all along had kept themselves fully informed of the proceedings, now, joined by nine others, returned to the capitol, during the night of the sixteenth, took possession of the hall of the House of Representatives, drew up formal charges against Daniel Richards, the president of the convention, accused him of many misdemeanors, deposed him from his office and elected Horatio Jenkins in his place. With the exception of the secretary and the chaplain, a new set of officers was chosen, new committees were appointed and the reorganized convention began its work. This proceeding intensified the animosities between the factions, and to prevent an outbreak, General Meade came to Tallahassee on the seventeenth.[1] He urged a compromise and his advice, happily, was followed. Both presidents resigned, though Richards filed a formal protest.[2] The convention then elected Jenkins.[3]

Though a parliamentary reconciliation had been effected, the animosities between the factions constantly broke out in debate. However, in spite of the threatening language which filled the air, a constitution was worked out and adopted, on the twenty-fifth, by nearly a two-thirds vote,[4] though eight members signed under protest,[5] asserting that they had already signed one instrument. Nine refused to sign. The constitution adopted three weeks before was ignored; this second one was less objectionable to the white population. It was probably prepared by the fifteen delegates in private session at Monticello just before they returned to reorganize

[1] See General Meade's report, Senate Executive Document, No. 13, 41st Congress, Second Session, p. 25.

[2] Journal, p. 34.

[3] 32 to 13: Journal, 35.

[4] 28 to 16.

[5] Journal, 131.

the convention; it is altogether too elaborate to have been worked out in three days—the time given to its discussion. It gave the suffrage to every male person of age "of whatever race, color, nationality or previous condition, otherwise qualified as citizens of the State and of the United States,"[1] but it entirely omitted the disqualifying provisions common to the other reconstruction constitutions of the period. It forbade civil or political disqualifications, on account of race, to hold office;[2] but required the legislature to prescribe educational qualifications for the voters after the year 1880, the only clause of the kind in a reconstruction constitution.[3] As completely as could be expressed by a State constitution, this one put the two races on the plane of equal political rights and recognized them as having a common social life.

Before adjourning, the convention, like that of South Carolina, transformed itself into a political body and nominated candidates for State offices, though these were relatively fewer than in other States, because most of them, by the new constitution, were to be appointees of the governor. The constitution was ratified at the three days' election beginning the fourth of May.[4]

Political affairs in Texas at this time were more unsettled than elsewhere in the South, and the reconstruction acts were carried out there with greater difficulty. By the middle of December, 1867, the registration of voters was completed, and showed a majority of about nine thousand whites in an aggregate registry of one hundred and four thousand.[5] The election of delegates to a

1 Article XV, Section 1.

2 Article XVII, Section 28.

3 Article XV, Section 7.

4 The vote for the constitution was 14,511; against it, 9,371. Congressional Globe, June 5, 1868, p. 2858.

5 104,259; 56,678 whites and 47,581 negroes.

constitutional convention was fixed for four days, beginning with the tenth of February, and ninety members were to be chosen. The Conservative party in the State vigorously opposed negro suffrage and the whole congressional plan of reconstruction; it therefore advised its members to so vote on the question of a convention as to secure delegates who would oppose negro suffrage, yet who would form a constitution that would be acceptable to Congress. At the election at which a majority of more than thirty thousand voted in favor of a convention, nine of the delegates chosen were negroes.[1]

The convention assembled at Austin on the first of June.[2] Its members were nearly equally divided as Radicals and Conservatives and were led by Andrew J. Hamilton, lately provisional governor of the State, and Morgan Hamilton, his brother. The provisional governor, E. M. Pease, sent the convention a message, outlining the measures which he thought it should adopt. He lamented that, though three years had passed since the conclusion of the war, the great majority of the population of the State had profited little from past experience and still scornfully rejected the mild terms of reconciliation offered by the United States. Though complaining of disfranchisement because of their participation in the rebellion, the whites still insisted that loyal citizens should not be enfranchised because they were of a different race. Though political disabilities would undoubtedly be removed as the safety of the general government would permit, yet the disloyal whites persisted in demanding the

[1] The returns of the vote are imperfect. It appears that the vote for the convention was 43,142; against it, 11,246.

[2] Journal of the Reconstruction Convention which met at Austin, Texas, June 1, A. D. 1868. Austin, Texas: Tracy, Siemering & Co., Printers, 1870; 1,089 pages. This is the Journal of the first convention.

control of the State on the terms proposed by President Johnson in 1865. The convention could well consider whether much harder terms would not be imposed upon the whites if, by their continued opposition, they should succeed in defeating the effort of Congress to reconstruct the State.

The governor advised the convention to declare all pretended acts of secession, and all laws in aid of the rebellion null and void from their inception, and urged it to repeal at once all laws that discriminated against persons on account of color, race or previous condition. All debts of the State outstanding at the commencement of the rebellion should be paid, but all incurred in aid of it should be repudiated. To every inhabitant of the State, who had not forfeited his rights by participation in the rebellion, or by conviction for crime, equal political and civil rights should be secured, and those who had participated in the rebellion should be temporarily disfranchised to such an extent as would place the political power of the State in the hands of those who were loyal to the General Government. Free public schools for the education of every child in Texas should be immediately established and be liberally supported; and every citizen of the State, who had not previously received a reasonable amount of land out of the public domain should now be given a homestead.

But the most startling information given by the governor was of the moral and social condition of the State. He declared that crime had never before been so prevalent, and that the condition of things had become so alarming that the people, in many instances, had taken the law into their own hands.[1] So terrible was the reign of crime and lawlessness that the convention appointed a special Committee of Investigation, which made its report on the

[1] Governor's Message in the Journal, 12-17.

thirtieth of June. Within three years, as this report shows, there had been over nine hundred homicides[1] in the State; three hundred and seventy-three freedmen had been killed by whites, yet only two whites had been killed by freedmen.

The evidence disclosed that a very large portion of the murdered whites were Union men, and that the criminals, with remarkably few exceptions, were disloyal to the Government.[2] The multitude, who had participated in the rebellion, disappointed and maddened by their defeat, were intensely embittered against the freedmen on account of their emancipation and enfranchisement, and against the loyal whites for their persistent fidelity to the Union. They were determined, by every means promising success, to resist the establishment of any State government, republican in form, and it was their purpose, even by desperate measures, to create such a state of alarm and terror among Union men and freedmen as would compel them to abandon the advocacy of impartial suffrage or to flee from the State. This feeling of animosity prompted and inspired them to many murders, unrestrained as they were by any fear of retribution.

In few localities in the State was there absolute freedom of speech. Union men dared not declare their sentiments. In many places they held public meetings only when supported by Federal troops, but generally they dared not hold them at all. Their assemblies had frequently been broken up and fired upon. Judges on the bench had been murdered simply because they were loyal men.[3] Hundreds had been compelled to fly from their homes to escape

[1] Total number of whites, 470; of freedmen, 429; Journal, 194.

[2] Journal, 195.

[3] Judge Black, 1867, Uvalde County; Milton Biggs, appointed judge of Blanco County, 1867.

assassination. The mass of testimony on the persecution suffered by the freedmen was overwhelming. In very many parts of the State they were wantonly maltreated and slain simply because they were free and claimed to exercise the rights of freedmen. While engaged in harmless amusements or in their usual occupation, or sitting quietly in their homes, they were suddenly attacked by those whom they had never seen before. White men had been known to drive over the country, shooting the freedmen wherever they met them. The churches of the blacks were burned over their heads; their cabins were destroyed; their crops trampled upon; their wives and children mutilated and left for dead. Organizations of disloyal men, leagued together for the purpose of murdering loyal citizens, kept the State in a reign of terror. In three years there had been two hundred and forty-nine indictments for murder, found in the district courts, but only five convictions, and for the nine hundred murders known to have been committed since the conclusion of the war, there had been but one capital execution according to the form of law, and this was the execution of a freedman. In some thirty counties the combination of lawless men openly defied the civil authorities. County officers were often involved in acts of violence, or connived at them, or wilfully neglected to make arrests. In one county, the sheriff belonged to a band of murderers, and the sheriff of another lead a body of desperadoes.

But these obstacles to the punishment of criminals did not wholly explain the failure of civil government in the State. Juries would not convict disloyal men for offenses committed against Union men and freedmen, neither would they award judgments against those who had been identified with the rebellion. If the court charged in favor of the freedmen, the jury would commonly decide

against him, contrary to the law and the evidence. The spirit of moderation which the commander of the fifth military district had shown had worked disaster in the State. It had practically amounted to the suspension of the military power, and criminals, who entertained little fear of the civil courts, interpreted the new condition of things as a license for the perpetration of all manner of villainies. The responsibility for this change was fixed, by the committee, upon President Johnson, who, charged by the law to keep the peace and to afford protection to life and property, and having the army of the United States to assist him, had failed. He was accused of persistently refusing to try criminals; of rejecting the prayers of the governor of the State and of the Commanding General of the District[1] for adequate tribunals, and of turning a deaf ear to tried and persecuted loyal citizens. To his charge, the report laid the death of hundreds of the loyal citizens of the State, "a responsibility that should load his name with infamy and hand his very memory to coming years as a curse and an execration."[2] In the face of persecution, social proscription and death, the loyal men of the State had stood firm in their devotion to the national government, and claimed its protection. It had not been granted them. The committee concluded its long report with a resolution, requesting the president of the convention to forward a copy to the President of the Senate and the Speaker of the House of Representatives, that Congress might afford the State relief.[3]

No less discouraging was the report of William Alex-

[1] Major-General W. S. Hancock.

[2] Journal, 203. The language of the report is closely followed. It gives details of the crimes committed. One thousand copies were reprinted for distribution.

[3] The Report is printed as Senate Miscellaneous Document No. 109, 40th Congress, Second Session, 1867-1868.

ander, the Attorney-General of the State, who corroborated the appalling details reported by the committee, and called their particular attention to the pretended laws against the freedmen based upon the rejected constitution of 1866. The main object of those who had made that instrument, he said, was to restore African slavery in the modified form of peonage. The so-called labor law of the State provided expressly for such a system, though without using the term, but modelled after the system which had recently been abolished in Mexico by the liberal party. Persons of color could not testify in all cases, and, under the pretended law, they had no more rights than free persons of color had enjoyed during the existence of slavery. The law specially declared that they were not citizens. They were forbidden to carry fire-arms on enclosed land without the consent of the owner; a law intended to operate against them alone. Their children were excluded from the schools and from the assistance which the State gave to indigent whites. Only white settlers could receive donations of public lands, and white men only could serve on juries, although the rigor of this pretended law had been somewhat softened by the military commander of the District.[1] The mode of corporal chastisement which the apprentice law permitted, was intended to be inflicted only on the blacks. They were by law to ride, if at all, in special cars, but this law had likewise been annulled by military order.[2] The vagrant act was particularly intended to make their reduction to slavery easy, and the laws for the employment of convicts for petty offenses and for employing convict labor on railroads, were cunning devices to enslave them. The stay-law prevented them from collecting their wages, and the law which gave a lien on the crop

[1] Brevet Major-General Griffin.
[2] General Griffin.

was an ingenious device by which a man who rented land and cultivated it with hired laborers might avoid paying them. The tax law, said to be substantially the confederate act, more than doubled the tax of the freedman, who could not read.[1]

In addition to the twenty-four pretended general laws levelled at the freedmen, the attorney general cited fifty others enacted under the constitution of 1866,[2] hostile to the United States and its loyal citizens and incompatible with the national Constitution. These laws were the production chiefly of the ninth and tenth legislatures of the State, whose members were "public enemies" and carried on active hostilities against the General Government. The State had been so gerrymandered as to make it impossible to elect a loyal member to the legislature. A district court had been created for Davis county, "the rebel name for Cass county," the change of name having been made during active hostilities "expressly to dishonor General Cass, on account of his loyalty, and to honor Jefferson Davis, on account of his disloyalty." Judicial districts had been organized so as to throw loyal judges out of office.

Unnecessary offices had been created in order to find places for prominent Confederates.[3] The sale of school lands had been manipulated so as to make them subservient to land speculators; a blow to free public schools. A county of Hood, named in honor of the general in the Confederate army, had been created; guardians and administrators had been empowered to compromise with cred-

[1] Report of the Attorney-General of Texas, 1867, transmitted to the convention by the Governor, June 19, 1868; Journal of the Convention, First Session; Appendix, 947-955.

[2] Id. 956, 962.

[3] The office of State Librarian, at $1,000 a year, which was conferred as a pension on the Private Secretary of Jefferson Davis. Id. p. 957.

itors. The laws providing for public printing were an ingenious scheme to subsidize a disloyal paper by covertly paying the highest price for the work. The law establishing the University of Texas was contrary to the civil rights act, and somewhat untimely in a disorganized State that had not established so much as one free public school. A provision had been made for the publication of the reports of the rebel supreme court, and another act made the Clerk of the United States District Court the custodian of the records of the District Court of the Confederate States. The election law was a plain effort to restore rebel officers to office, excepting assessors and clerks.

These, and other acts, the Attorney General complained of, showed distinctly the spirit of rebellion. He had prepared his report in compliance with a petition signed by the military commander of the District and the principal civil officer of the provisional government. His indictment of the constitution of 1866 and the laws enacted under it antagonized the civil administration of the State and led to his resignation. But no one attempted to deny the truth of his report.[1] He sustained his indictment in an able opinion in which he examined the objectionable legislation somewhat at length, and established his proposition that the constitution of 1866 and the laws dependent upon it were null and void from the beginning.[2]

A week after the Committee on Crime and Lawlessness had reported, the Democratic State convention met at Bryan and appointed a similar committee. Its report

1 See Document B, Id. 962-966.

2 This opinion was somewhat unique in its way. It tested the constitution of 1866 and the laws under it by the acts of Congress and the decisions of the Supreme Court of the United States, and attempted to show that, by the principle of American law, the Texas constitution and the acts were null and void. See the opinion in the Journal, 968-977.

corroborated the details of that made by the convention's committee; it admitted with sorrow the prevalence of crime, but attributed it to altogether different causes from those assigned by the convention's committee, and attributed it chiefly to the general demoralization resulting from the war, and to the absence of any government in the State for several months. The disbandment of the troops, both federal and Confederate, it said, had contributed to the reign of crime; but the chief reason was "the changed condition of society resulting from the emancipation of the negroes." Their indolent habits and their thievish disposition, and above all their turbulent spirit instigated by a body of designing men, were at the bottom of the trouble. The Democratic committee agreed that freedom of speech was not allowed in the State and that its greatest need was an efficient and liberal government.

The last days of August were now approaching, and the convention had spent most of its time in discussing matters more appropriate for a legislative body. It had been in session eighty-five days, had cost the State one hundred thousand dollars, and, on the twentieth, had asked the approval of General Reynolds for an additional appropriation of twenty-five thousand. Considering the condition of the treasury, the rate at which money was coming in, and the prospective wants of the State for current expenses, he was forced to decide that further appropriation for the expenses of the convention must be forbidden, and he returned its resolution without approval. This brought the first session of the convention promptly to an end, and it adjourned on the last day of the month, to assemble again on the first Monday in December. Its committees on the various parts of the constitution had reported. A constitution was read for final passage and signature, and the convention designated nine newspapers in the State

which should publish it in large extra editions for distribution among the people.[1] They would then become familiar with its contents and be prepared to vote upon it when submitted to them.

Meanwhile the ratification of the Fourteenth Amendment had been going on in other States of the Union. Nebraska, the twenty-second State to adopt it on the fifteenth of June, 1867, was followed by Iowa, on the third of April, 1868, after an interval of nearly a year.[2] Three days later, the general assembly of Arkansas ratified unanimously.[3] This act completed the work of reconstruction by the State, and, by the terms of the Congressional acts, entitled it to admission. A bill to this effect was reported in Congress, on the eighth of May, by Thaddeus Stevens of the Committee on Reconstruction. It recited the late conduct of the State in complying with the reconstruction acts and declared it entitled to representation in Congress upon one fundamental condition,—that its constitution should never be so changed as to deprive any citizen, or class of citizens, of the United States of the right to vote, who were entitled to the privilege by

[1] Journal, 888.

[2] For the ratification see Doc. Hist. of the Constitution, II, 739, 743. The vote in the Iowa House, January 27, 1868, was 68 yeas, 12 nays; absent and not voting, 20. See Journal of the House of Representatives of the Twelfth General Assembly of Iowa, 133. In the Senate the vote was 34 yeas and 9 nays. See its Journal, p. 265. The joint resolution was approved by the Governor April 3d.

[3] Doc. Hist. II, pp. 747-750. The new general assembly of Arkansas began its session at Little Rock, April 1st. The Superintendent of the Public Buildings claimed that he had no official knowledge of such an assembly, refused to open the legislative halls. The members promptly sent for a locksmith and took possession of their respective halls on the 2d. Some of the Conservative papers of the State continued to speak of the assembly "as the pretended legislature."

the new constitution of the State.[1] Stevens was determined to press the bill to an immediate vote. Its opponents pleaded for time in which to become familiar with the new constitution of the State. They denounced the fundamental condition, as a violation of the rights of a State, and, more particularly, because it made the experiment of negro suffrage a permanent institution.

The chief objector to the condition was Woodward, lately a Judge of the Supreme Court of Pennsylvania. The constitution of Arkansas, he said, was not republican in form. At this James G. Blaine pointedly asked him whether, in his opinion, the constitution of Arkansas at the time of its admission, twenty-two years before, which forbade the legislature of the State at any time to take any measure toward the abolition of slavery,[2] was republican in form? But Judge Woodward declared the question irrelevant and would not answer. Stevens cited the admission of Illinois, Missouri, Michigan and Texas, each of which came into the Union upon conditions, as a sufficient precedent for the present case, and pronounced the new constitution of the State "above suspicion." He called for the vote and with greater confidence as he produced a certificate of Seward, the Secretary of State, declaring officially that Arkansas had adopted the fourteenth amendment, and it was filed as a part of the day's proceedings. The bill was then passed by a vote of more than three to one.[3] In the Senate it was amended, though the change was in the language rather than the substance of the fundamental condition. It was sufficient, however, to precipitate a long debate in which that which had already been said on reconstruction was said again.

[1] Congressional Globe, May 8, 1868, p. 2390.

[2] Arkansas constitution, 1836, Art. VII, Sec. 1, Emancipation of Slaves.

[3] 110 to 32; not voting, 47. Globe, 2399.

Senator Wilson urged a liberal treatment of the reconstructed States. They had reformed their constitutions, he said; had granted equal suffrage to all classes and conditions of men, without discrimination on account of color or race, and should be welcomed back into the Union.[1] But his generous sentiments were not shared by the majority of his own party. They insisted that the return of the South must be in strict exactness with the letter and spirit of the reconstruction acts. The debate wandered to the question whether the Fourteenth Amendment was ratified even without the vote of Arkansas. Wilson believed that the amendment, when ratified by the constitutional majority of the loyal States, had become a part of the Constitution, but he confessed that many of the ablest legal minds of the country denied this, and he doubtless knew that it was denied by the majority of his colleagues. Two of the free States had already withdrawn their assent. Senator Frelinghuysen of New Jersey, one of the States which had withdrawn, denied the right of withdrawal, and in this he expressed the opinion of his colleagues and doubtless of the majority of the voters in the country. On the first of June the bill, as amended, passed the Senate. The House refused to concur in the amendments, and a Committee of Conference was appointed, whose report was agreed to by the Senate on the sixth, and by the House two days later.[2] The fundamental condition of the original bill was retained.

On the twentieth, the President returned the bill to the House without his signature but with objections, repeating those made by him all along to the reconstruction acts. Arkansas, he said, was not out of the Union, and Congress could not impose conditions upon

1 Congressional Globe, May 30, 1868; 2690-2691.
2 Globe, 2938.

a State. The question before Congress was, solely, to judge of the qualifications of the representatives whom the State chose to send. The fundamental condition intended to regulate the elective franchise was a plain violation of the Constitution. This failed to provide in what manner the State should signify its acceptance of the condition, and failed to prescribe any penalty for neglect to do so. Moreover, the acceptance of the civil and political equality imposed upon the people of the State as a condition of their return to the Union, it was well known, was contrary to the wishes of a large portion of the electors. If the voters in many of the States, north and west, were required to take such an oath as a test of their qualification, there was reason to believe that the majority of them would remain away from the polls rather than comply with its degrading condition. If the State should choose to reject the fundamental condition, might there not be, at some future day, a recurrence of the troubles which had so long agitated the country?[1] The veto message having been read, the House, without debate, passed the bill by a larger vote than before,[2] as the Senate did, also, two days later.[3]

While the Arkansas bill was under discussion, Florida ratified the Fourteenth Amendment.[4] Individual bills for the admission of the five other southern States that had now complied with the reconstruction acts had been offered in Congress, while the Arkansas bill was before it. Their fate was like that of the various constitutional amendments which, proposed early in 1867, had at last

[1] Richardson, VI, 648-650.

[2] June 20, 1868; 111 yeas, 31 nays, 48 not voting. Globe, p. 331.

[3] June 22, 1868; 30 yeas, 7 nays, 17 absent. Globe, p. 3363. For the act see Statutes at Large, Vol. XV, pp. 72-73.

[4] June 9, 1868; see Doc. Hist., II, p. 751. It was the 25th State to ratify. Senate, 10 ayes, 3 nays; House, 23 ayes, 6 nays.

given place to the joint resolution of the Committee on Reconstruction. Thaddeus Stevens of this committee, on the eleventh of May, reported an omnibus bill for the admission of these States, and the individual bills were straightway abandoned. It resembled the Arkansas bill by prescribing fundamental conditions: the first, the same as that for that State; the second, that no person should ever be held to service or labor as a punishment for crime in the States, except by public officers charged with the custody of convicts by the law; and the third, that the readmission of the States to the Union should take effect when the President should officially proclaim that their legislatures had ratified the Fourteenth Amendment.[1]

The principal objection of the minority to the measure was the permanency it guaranteed to negro suffrage. The prevailing exclusion of the negro from the exercise of this right, at the North was reiterated as a sufficient reason for a like exclusion at the South. The Republican majority, which had inflexibly carried through the reconstruction acts, was not now to be diverted from seizing their fruit, and Stevens, whose watchfulness over the rights of the negro and whose hatred of secession were controlling passions, further amended the bill by imposing a special condition upon Georgia, that it should not be admitted to representation until its general assembly, by a solemn public act, had declared the objectionable section of its constitution null and void. The objectionable clause was construed by Congress as a discrimination against the loyal men of the State.[2] With this amendment the bill passed the House.[3]

1 Congressional Globe, May 11, 1864, 2412-2413.

2 Article V, Section 17; see pp. 350-351. The Stevens amendment was adopted by a vote of 78 to 50; 61 not voting. Globe, May 14, 1868, p. 2465.

3 109 to 35; not voting, 45. Globe, Id.

On the second of June, Lyman Trumbull, of the Committee on the Judiciary, reported the bill to the Senate with an amendment which chiefly affected the State of Georgia, going further than the condition imposed by the Stevens amendment. It affected the rights of loyal citizens whom it sought to protect, and aimed to cut off all claims that might arise under contracts for slave labor. The chief objections to the bill advanced in the Senate were the familiar ones which had been urged against the whole reconstruction policy of the Republicans. There were now added, as objections, the inexpediency of including all the States in one bill, and the doubtful constitutionality of the condition imposed on Georgia, which might be construed by the Supreme Court as a violation of the principles of contracts. All these objections were silenced in the Senate on the tenth of June, when the bill passed by a vote of more than six to one.[1]

On the twelfth, Bingham of the Committee of Reconstruction reported a bill to the House, with the recommendation that it concur in the Senate amendments.[2] Farnsworth, a Representative from Illinois, urged that all relating to Florida be struck out from the bill, because its constitution had been irregularly formed, and was indeed the work of the minority of its convention. They had erected a little oligarchy in the State by giving to its governor the power to appoint nearly all the State offices. The constitution so apportioned representation as to give the control of the legislature to the sparsely populated portions of the State. Paine, of Wisconsin, also urged the exclusion of Florida, because she was inferior in wealth and numbers, he said, to an average congressional district of the country. But the friends of Florida

1 31 to 5; absent, 18. Globe, 3029.
2 Globe, 3090.

cited the approval which General Meade had given to its constitution, and Shellabarger, of Ohio, made answer to most of the objections, saying that the State had complied in substance and spirit with the acts of Congress, and that the objectionable details in its constitution related to matters not affecting the loyalty and safety of the State government, which was presented for the approval of Congress. Farnsworth's amendment was rejected[1] and the bill as amended by the Senate was passed.[2]

On the twenty-fifth, the President returned the bill with a veto message. It superseded, he said, the plain and simple mode prescribed by the Constitution for the admission of the Senators and Representatives from these States to their seats; assumed an authority over six States of the Union which had never been delegates to Congress, and which was not even warranted by previous unconstitutional legislation upon the subject of restoration. The conditions which the bill imposed were in derogation of the equal rights of the States and subversive of the fundamental principles of the Government. In the case of Alabama, the bill violated the plighted faith of Congress by forcing upon its people a constitution which they had rejected at an election held in strict accordance with the express terms of an act of Congress, requiring that a majority of the registered electors should vote upon the question of its ratification.[3] The Senate immediately repassed the bill, notwithstanding the objections of the President, by a vote of thirty-five to eight;[4] and the House, also, by a vote of one hundred to thirty-one.[5]

1 99 to 45.

2 111 to 28; not voting, 50. Globe, June 12, 1868, p. 3097.

3 Richardson, Vol. VI, pp. 650-651.

4 June 25, 1868; Globe, p. 3466.

5 Id. p. 3485. See the act in the Statutes at Large, Vol. XV, pp. 73-74.

The legislatures of the States, mentioned in the act, soon complied with its conditions.[1] North Carolina, by joint resolution ratified the Fourteenth Amendment on the fourth of July.[2] Louisiana[3] and South Carolina, on the ninth, and Alabama, on the thirteenth.[4] It was rejected by Delaware, Maryland, Kentucky and California. On the twentieth, Seward, the Secretary of State, announced, conditionally, its adoption by the requisite number of States. If the resolutions of the legislatures of Ohio and New Jersey, which had withdrawn their assent, were to

[1] Georgia, on the 21st of July, 1868, by a vote of 24 to 14 in the Senate, and 89 to 70 in the House of Representatives, ratified the 14th amendment and complied with the special condition imposed by Congress. No copy of the act of ratification was put on file in the Department of State at Washington, and it does not appear that any was received. On the 2d of February, 1870, the Georgia legislature adopted a Joint Resolution which should be the public act required of the State to declare its assent to the congressional condition. Senate Miscellaneous Document No. 38, 41st Congress, Second Session, 1869-1870. The legislature of the State, in 1870, treated all the legislative action since July, 1868, as illegal, and at the time it ratified the 15th amendment ratified the 14th also. Just as the House of Representatives was about to vote on the concurrent resolution to declare the 14th amendment a part of the Constitution (July 21, 1868) the Clerk read a telegram of the same date, from Rufus D. Bullock, Governor-elect of Georgia, that the 14th Article and the fundamental condition had been adopted by the Georgia legislature by a majority of 34 on joint ballot. See Congressional Globe, July 21, 1868, 4296. But the House refused to accept the telegram as official notice and would not include Georgia in the list of ratifying States.

[2] Doc. Hist. II, pp. 754-757. The vote in the North Carolina Senate, July 2, 1868, was 34 ayes, 2 nays; in the House, 82 ayes, 19 nays.

[3] Louisiana ratified, July 9, 1868; in the House, July 1, by 57 ayes to 3 nays; in the Senate, July 9, by 22 ayes to 11 nays. Senator Bacon, of New Orleans, filed a long protest; the three negative votes in the House were cast by the only Democrats in that body. See New Orleans Times of July 2, 1868.

[4] See the ratification in Bulletin No. 7, 758-769. South Carolina ratified by a vote of 108 to 12 in the House; Senate, 23 to 5. In Alabama, the vote in the Senate, July 13, 1868, was 28 to 0.

be deemed as remaining in full force and effect, the amendment had been ratified by three-fourths of the whole number of States in the Union.[1] On the following day, Congress, by a joint resolution, which originated with John Sherman,[2] declared the article a part of the Constitution and instructed the Secretary of State to issue the necessary proclamation. This he published on the twenty-eighth.[3]

The ratification of the amendment by the southern States was followed by proclamations from the President announcing each adoption as it was made.[4] The passage of the omnibus act marked also the date of the return of the States to representation in Congress. On the twenty-fifth of June, the Senators and Representatives of the South, excepting those of Virginia, Mississippi and Texas, were again in their seats in Congress, after an absence of seven years.[5]

Before the year closed, a third State, Oregon, withdrew its assent to the amendment. At the October election, in Ohio, in 1867, the Democrats obtained a majority of one, in the State Senate, and of six in the House. Almost on the first day of the session of the general assembly, which began on the sixth of January, 1868, a joint resolution was introduced in the House to rescind the ratification of the

1 Doc. Hist. II, pp. 783-787.

2 Globe, July 21, 1868, 4266, 4295, 4296.

3 Doc. Hist. II, 788-794.

4 See the Proclamations in Richardson, Vol. VI, p. 656 et seq.

5 The period during which these States were without representation in Congress was as follows: South Carolina, November 10, 1860-June 25, 1868; Alabama and Florida, January 21, 1861-June 25, 1868; Arkansas, July 11, 1861-June 22, 1868; Georgia, February 4, 1861-July 29, 1868; Louisiana, February 4, 1861-June 25, 1868; North Carolina, July 12, 1861-June 25, 1868; Tennessee, March 3, 1861, and March 4, 1863, to March 4, 1865. The dates are those given in the Senate Manual for 1898; pp. 422-473.

Fourteenth Amendment made on the eleventh of January, of the preceding year. The joint resolution was carried through in great haste,[1] the journal preserving no evidence of any debate. It passed the Senate on the thirteenth, under the call of the preceding question, and without debate.

On the following day the Republican Senators filed a protest,[2] declaring the necessity and justice of the amendment and its vital importance to the country. It had been fully canvassed throughout the State, previous to the election of 1866, and had received the hearty endorsement of the people, was attested by the largest majority, save one, ever given at a congressional election in Ohio. The members protested against the hasty manner in which the act of ratification had been repealed, and declared that it was contrary, in its method, to the practice of the legislature throughout the history of the State.[3] The defeat, by a majority of fifty thousand votes, of the proposed amendment to the State constitution, granting the right of suffrage to negroes, was cited by those who now voted for withdrawal, and by their supporters, as a sufficient foundation for their action.[4]

In the Senate of the United States, Sherman declared that the Ohio legislature, which had withdrawn the assent

[1] January 15, 1868; in the House, 56 yeas and 46 nays; in the Senate, 19 yeas and 7 nays.

[2] It is given in the Congressional Globe for January 21, 1868, p. 877. For the resolution withdrawing the assent of the State see p. 876.

[3] Ms. letter of Joseph H. Barrett, Times and Chronicle Office, Cincinnati, March 30, 1862, to John A. Jameson. Among the signers to the protest was J. Warren Keifer, afterwards Speaker of the House of Representatives. (47th Congress, December 5, 1881-March 3, 1882.)

[4] For the proposed amendment, see Congressional Globe, p. 876.

of the State, had been elected upon a collateral issue, and that its unprecedented action did not represent the will of the majority of the people. Though the suffrage amendment to the State constitution had been defeated, he said that no man had dreamed that the legislative assembly elected under this issue would use the political power entrusted to it for the time being for the purpose of recalling the assent of the State to the Fourteenth Amendment. The withdrawal, Senator Sherman declared, was without precedent in our history, and also without authority, for, though the Constitution provided for the assent of a State to an amendment it made no provision for any withdrawal of assent when once given. "If the State assenting thinks that it has made a mistake," replied Reverdy Johnson, "and that the Constitution should not be amended in the way proposed, it may withdraw."[1]

Ohio was followed by New Jersey, which withdrew its assent on the twenty-seventh of March. In that State, as in Ohio, a political struggle was going on, whose main issue was the extension of the suffrage to the negro. The Republican party at the State Convention held at Trenton in July, 1867, pledged itself to the eradication of the word "white" from the State constitution. The legislature elected on this issue was Democratic, and, by a vote of five to one, the House, in 1868, declared by resolution, that to place the negro upon a political equality with the white man was incompatible with the best interests of the people of the United States. The House was now Democratic, and saw unalterable opposition to the establishment of negro suffrage in the State by Congressional legislation, because it held that "each State has the exclusive right to regulate the qualifications of its own voters."[2]

[1] Globe, 877-878.

[2] The House of Assembly adopted this resolution by a vote of 35 to 7.

This hostility to the extension of the suffrage to the negro was the foundation of the joint resolution which the legislature now proceeded to pass, withdrawing the assent of the State to the amendment. The legislature claimed an undeniable right of withdrawal, because the amendment had not yet received the assent of three-fourths of the States. The authors of the Fourteenth Amendment, so the joint resolution continued, in order to secure its adoption, had excluded from the two Houses of Congress eighty representatives from eleven States, but finding that two-thirds of the remaining members could not be brought to assent to the amendment, they had deliberately formed and carried out the design of mutilating the integrity of the United States Senate, and without justification, other than the possession of the power without right, and in violation of the Constitution, had ejected a member[1] of their own body and thus practically denied to New Jersey its equal suffrage in the Senate. By this means the vote of two-thirds of Congress had been nominally secured.

But there were explicit objections to the proposed amendment. It declared that naturalized persons should be citizens of the United States, as if they were not so without such an absurd declaration. It lodged the pardoning power with the legislature, whereas by our system it properly belongs to the executive. It denounced and inflicted punishment for past offenses by constitutional provision, thus violating a cardinal principle of American liberty.[2] It usurped the power of punishment, which in any coherent system of government belongs to the ju-

[1] John P. Stockton, of New Jersey, whose seat was declared vacant by the Senate, by 23 yeas to 20 nays, March 27, 1866. See the Congressional Globe of this date, p. 1677. Mr. Stockton's seat was declared vacant on the ground that he had not been lawfully elected.

[2] The principle of ex post facto laws.

diciary and committed it to the people in their sovereign capacity. It degraded the Nation by proclaiming to the world that no confidence could be placed in its honesty or morality. It appealed to the fears of the public creditor by publishing a libel on the American people and by fixing it forever in the American Constitution as a stigma on the present generation that there must be a constitutional guard against the repudiation of the public debt. It enlarged the judicial power of the United States so as to bring every law passed by the State within the jurisdiction of a federal tribunal. It made a new apportionment of representation in national councils for no other reason than to secure to a political faction the votes of a servile and ignorant race. It set up a standard of suffrage dependent upon citizenship, age, inhabitancy and manhood, and any interference whatever by a State imposing any other reasonable qualifications would cause a reduction of the State's representation. The section on impartial suffrage was clearly intended to transfer to Congress the whole control of the right to vote, and to deprive the State of a free representation by destroying the power of regulating the suffrage within its own limits.[1]

On the thirtieth of March, the joint resolutions were presented to the House of Representatives by a New Jersey member. Elihu B. Washburn, of Illinois, immediately moved that they be returned by the Speaker of the House to the member who presented them; that their title only should be referred to in the Journal and the Congressional Globe, and further, that the House deny the constitutional right of any State legislature to withdraw its assent to the amendment. The rules were suspended and

[1] Acts of the 92d Legislature of the State of New Jersey and the 24th in the new constitution, 1868, pp. 1125-1131.

Washburn's resolution was carried by a two-thirds vote.[1] Both Ohio and New Jersey were included in the joint resolution of Congress in the list of ratifying States, and their acts withdrawing their assent were treated as null and void.

There was one more case of withdrawal, though long after the Secretary's proclamation that the amendment had become a part of the Constitution. Oregon had ratified in September, 1866.[2] On the fifteenth of October, two years later, it withdrew its assent.[3] Its reasons were partly local and partly general, but were, in truth, because the political organization of the State legislature had changed and the Democrats were in the majority. The legislature now declared that the ratification, in 1866, had been effected by the votes of two members who were illegally and fraudulently returned,[4] and that three days after its adoption the two members, whose votes had secured it, had been declared not entitled to their seats, and that, on the same day the two duly elected members[5] had entered their protest on the Journal of the House, declaring that if they had not been excluded from their seats they would have voted against the amendment and thereby defeated its adoption.

But this was not all. The newly constituted bodies avowing themselves to be the legislatures of six of the southern States[6] were created by a military despotism against

[1] 80 to 17; not voting, 92. Congressional Globe, March 30, 1868, pp. 2225-2226.

[2] In the Senate, September 14, 13 to 9; in the House, September 19, 25 to 21.

[3] In the House, for rescinding, 26; against, 18; in the Senate, October 5th, for rescinding, 13; against, 19.

[4] Thomas H. Brentz and M. M. McKean, of Grant County.

[5] J. M. McCoy and G. Knisley.

[6] Arkansas, Florida, Louisiana, Alabama, South Carolina and Georgia.

the will of the legal voters, under the so-called reconstruction acts of Congress; this was usurpation, unconstitutional, revolutionary and void; and consequently, these bodies could not legally ratify the amendment on behalf of the States, which they pretended to represent, nor affect the rights of the other States of the Union. For these reasons, and especially on account of the fraudulent character of the former vote in the Oregon House, the action of that body in ratifying the amendment did not express the will of the House as it then stood, after being purged of its illegal members. The legislature, therefore, now rescinded the act of ratification and refused the assent of the State to the proposed article. Any amendment to the Constitution on the subject of representation should be proposed to the States by a Congress in which all were represented, or by a convention of all the States, where each could be heard in proposing amendments as well as, subsequently, in ratifying them.[1]

Under the joint resolution of Congress, however, this action of the Oregon legislature was wholly without effect.[2]

[1] See the Oregon resolution of withdrawal in Miscellaneous Document No. 12, House of Representatives, 40th Congress, Third Session. They were referred to the Committee on the Judiciary, December 14, 1868.

[2] On the 8th of December, 1868, Resolutions of the Oregon Legislature demanded the resignation of the two United States Senators from the State, George H. Williams and Henry W. Corbett, because of their support of the Reconstruction Measures, were read in the House of Representatives on demand of Fernando Wood of New York. Mr. Washburn immediately offered a resolution that the paper "be returned to the presiding officers of both Houses of the Oregon Legislature, the same being scandalous, impertinent and indecorous," which, in spite of the protest of Mr. Wood that Oregon was a sovereign and loyal State, was carried by a vote of 126 to 35. See Globe, Third Session, 40th Congress, Part 1, pp. 15-16.

It showed, however, as did the withdrawals of Ohio and New Jersey, that there as a deep undercurrent of opposition in the northern States to the extension of the suffrage to the negro. Undoubtedly had Congress ventured to prescribe the same conditions of ratification of the amendment in the northern as in the southern States, that each should revise its constitution and allow the negro to vote on equal terms with the white man, the amendment would never have become a part of the Constitution.

Of the authors of the Fourteenth Amendment the most conspicuous and unflinchingly devoted to its adoption, and to the general welfare of the race for whose benefit it was primarily intended, was Thaddeus Stevens of Pennsylvania. No other member of Congress, unless it be Lyman Trumbull, a Senator from Illinois, was more closely identified with the whole policy of Congress formulated in the Reconstruction Acts and culminating now in the changed Constitution. Certainly no member of the House divided authority with Thaddeus Stevens. He dominated its proceedings throughout the Reconstruction period. Yet at this time he had passed the time of life when most men are glad to retire to well-earned repose. If Lincoln was the Moses of the African race in America, Thaddeus Stevens was its Joshua. He fought its battles with terrible earnestness and routed its foes in hopeless defeat. To him the negro was the helpless ward of the Nation and he guarded his interests with a fatherly watchfulness which never slumbered. He bore the wearisome details and vexations of congressional life with the endurance of the granite hills of his native Vermont.

Though the Father of the House in years, his tireless energy exhausted its youngest members; and though a cripple and in broken health, he was never known to be absent from duty, whether in committee or as the leader

of the House. He clung to its leadership tenaciously. Conscious that his life was drawing swiftly to a close, he was carried to the sessions, daily, in his chair, from which by the courtesy of the House, he seldom arose, though participating with virile vigor in its work. In the long struggle which culminated in the impeachment of President Johnson, it was the irresistible leadership of Thaddeus Stevens that gave power and coherence to the whole movement. He it was, who, on that Tuesday morning in February, entered the Senate Chamber, and in the name of the House of Representatives and of the American people impeached Andrew Johnson, President of the United States, of high crimes and misdemeanors in office;[1] and it was he, who on the part of the House managed the impeachment throughout and was most disappointed at the President's acquittal.[2]

Throughout the bitter struggle over the return of the southern States to the Union, his lance was never at rest. He knew nothing of compromises; all his measures were radical and as his opponents believed, revolutionary. With his death, which occurred just two weeks after the Fourteenth Amendment became a part of the supreme law of the land, there vanished from Congress the most dom-

1 Globe, February 25, 1868, pp. 1405, 1421.

2 The last lengthy speech of his life was his address to the Senate as one of the managers of the impeachment on behalf of the House, April 27, 1868. He read a portion of his argument standing at the Secretary's desk, but after proceeding a few minutes, being too feeble to stand, he obtained permission to take a seat. He read nearly half from his chair, when, his voice becoming too weak to be heard, he handed his manuscript to General Benjamin F. Butler, also one of the managers, who concluded the reading. Supplement to the Congressional Globe, Trial of the President, Second Session, 40th Congress, 1868; pp. 320-324.

inating spirit it had ever known.[1] For twenty years he labored ceaselessly in it on behalf of the negro race. He hated slavery with all the hot intensity of his nature; and he urged the emancipation proclamation as right, just and expedient. He had initiated the Fourteenth Amendment and carried it through. He had formulated the policy of Congress in its four great reconstruction acts, and, to the last moment of his life, he believed that no measure which could be carried out against the southern people could be too severe.

The grand passion of his life,—the amelioration of the condition of the negro race,—he sought to carry out and make permanent after his death by providing in his will that his estate should become a fund for the care and education of negro children. He selected for his burial place a quiet and secluded spot at Lancaster, where persons of any race might be laid to rest; choosing his grave, as he declared, in the epitaph which he wrote for his tomb, that he might be enabled to illustrate in his death the principle which he had advocated throughout a long life,—the equality of men before their Creator. To this uncompromising, political Puritan must be accredited, above any other man, the authorship and the ultimate adoption of the Fourteenth Amendment.

The amendment established the citizenship of the negro[2] and was intended to secure him the benefits of his freedom. But it still left him without the right to vote. Its supporters had hoped that the southern States would be induced to grant him this right because of the increased representation they would thereby secure in Congress.

[1] He was born at Peacham (Danville), Caledonia County, Vermont, April 4, 1793, and died in Washington, D. C., August 11, 1868.

[2] Slaughter-House cases, 13 Wallace, 36.

This hope was not realized and the Republicans determined to take away from the States the power to discriminate against any citizen of the United States, as a voter,[1] on account of race, color or previous condition of servitude.

[1] U. S. v. Reese, 92 U. S. 214; U. S. v. Cruikshank, 92 U. S. 555.

CHAPTER IV.

FAILURE OF A SUFFRAGE AMENDMENT IN CONGRESS.

The Fourteenth Amendment practically placed the reconstruction measures of Congress beyond repeal. Its adoption had been accomplished by the enfranchisement of the negro and the disfranchisement of most of the white voters in the South. North and South it had been opposed by the Democratic party, whose hostility almost completely disarmed by the operation of the reconstruction measures in the South and by Republican votes in the North, was yet able to delay its adoption and to continue the struggle against it over two years.[1] Its supporters had expected that it would operate as an inducement to the former slaveholding States to admit the negro to the suffrage, and increase their representation in Congress proportionately.

The Republicans soon discovered that they had no foundation for this belief. The South felt that it had been coerced into adopting the amendment, and that the negro had been made the tool in its coercion. All the hostility to the measure, expressed in its early and prompt rejection by the southern States, awakened and was hurled against the negro as soon as it was ratified. The southern people preferred to have their number of representatives in Congress cut down rather than be compelled to live under negro rule. The prospect throughout the South was one of bitter and ceaseless violation of the amendment. At the North, where it was of slight practical importance,

[1] It will be remembered that it was passed by Congress on the 16th of June, 1866, and was proclaimed by the Secretary of State, July 8, 1868.

opposition was limited to the Democratic party. The race, long enslaved, but now suddenly enfranchised, was not transformed into an object of hatred by it as at the South. Democratic opposition at the North was mostly speculative, abstract, impersonal; at the South it was concentrated in the hatred, the fear, the loathing of negro rule. Opposition to negro suffrage in Ohio and New Jersey fairly showed the attitude of the Democratic party elsewhere at the North. The southern States, in making their recent constitutions, had omitted the word "white," which, until 1868, was in common use in the Union, as descriptive of the elector. The word remained in the northern constitutions and in the revulsion of political sentiment likely to follow so radical a regime as that enforced by Congress during the last four years, it was not probable that it would be obliterated. Clearly the great issue of the extension of the suffrage to the negro was not yet settled.

The time for another Presidential election had come, and, at Chicago, on the twenty-first of May, 1868, the Republicans nominated General Grant and Schuyler Colfax, on a platform which congratulated the country on the assured success of the reconstruction policy of Congress, as shown by the adoption, in the majority of the States lately in rebellion, of constitutions that secured equal civil and political rights to all persons irrespective of race. The public safety required the maintenance of equal suffrage for all loyal men at the South; but the question of suffrage in the loyal States, it was declared, properly belonged to their people to settle. In July, at New York, the Democratic party nominated Horatio Seymour and Francis P. Blair, on a platform which declared the reconstruction acts of Congress "usurpative and unconstitutional, revolutionary and void." The control of

the suffrage belonged exclusively to the States, and any attempt by Congress to deprive a State of this right was a flagrant usurpation of power and could find no warrant in the Constitution.

The two great parties thus stood pitted against each other on the issues of suffrage extension,—and for the first time the question was of the source and control of the right to vote. In the Presidential election, which occurred on the third of November, 1868, Virginia, Mississippi and Texas took no part, and by a concurrent resolution, Congress decided that the nine electoral votes of Georgia should not be counted so as essentially to change the result.[1] Happily the great majority, for Grant and Colfax, in the electoral college and their popular vote made the vote of Georgia of no vital importance in the election.[2] Both Houses of Congress continued Republican by large majorities.[3] The result of the election was considered proof that the majority of the voters of the country approved the reconstruction policy of Congress, and encouraged the Republican leaders to place beyond repeal that part of their policy which yet remained unsettled. This was,

[1] This was the Edmunds resolution, proposed February 6, 1869, agreed to by the Senate, 33 to 11, on the 8th; Globe, p. 978; and by the House, on the same day, by 98 to 17, 107 not voting; Globe, p. 972. It treated the vote of Georgia in the same way as that of Missouri, in 1820. See my Constitutional History of the American People, 1776-1850, Vol. I, p. 103.

[2] The electoral vote of Grant and Colfax was 214, of Seymour and Blair, 80; 34 States not voting; 23 electoral votes were not cast. The popular vote stood 3,150,071 for Grant and Colfax; 2,709,613 for Seymour and Blair.

[3] In the 40th Congress, the Senate stood 42 Republicans and 11 Democrats; the House, 143 Republicans and 49 Democrats. In the 41st Congress, now elected, the House stood 170 Republicans to 73 Democrats; in the Senate there were 61 Republicans to 11 Democrats.

essentially, to make permanent the security of the right to vote, irrespective of race, color or previous condition.

While the Fourteenth Amendment was under discussion in Congress, several joint resolutions had been offered, both in the Senate and House, proposing a suffrage amendment to the Constitution. One of the earliest of these originated with Senator Henderson of Missouri. It was introduced on the seventh of March, 1867, and is of interest because it ultimately became the Fifteenth Amendment.[1] But the proposed Fourteenth then dominated the attention of both Houses and it was not until December of the following year, six months after the Fourteenth had become part of the Constitution, that Congress seriously addressed itself to the question of further securing impartial suffrage. Several resolutions were then offered in both Houses, and though differing quite widely in their phraseology, they agreed in substance, that neither race nor color should be sufficient to exclude a man from the exercise of the right to vote.[2] A resolution was brought up by its author, George S. Boutwell, in the House, for discussion, on the twenty-third of January.[3] At the same time, the Judiciary Committee had under consideration a

1 See Congressional Globe, First Session, 40th Congress, 1867, p. 13. This was known as Senate Resolution No. 8.

2 See the resolution of Mr. Craigin of New Hampshire, in the Senate on the 7th of December, and of Mr. Pomeroy of Kansas, Mr. Kelly of Pennsylvania, Mr. Eldridge of Wisconsin, Mr. Stokes of Tennessee and Mr. Boutwell of Massachusetts, December 7-January 11. Globe, Third Session, 40th Congress, Part 1.

3 Its language is: Section 1. The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color or previous condition of slavery of any citizen or class of citizens of the United States. Section 2. That Congress shall have the power to enforce, by proper legislation, the provisions of this article. Globe, 286.

bill to enforce the provisions of the Fourteenth Amendment.

The measures were reported together. As Boutwell said, they were the last of a series of great acts growing out of the rebellion and necessary for the pacification and reorganization of the country. If the privilege of the elective franchise was secured to all its people, without distinction of race or color, the institutions of the country, both State and National, would be established upon the broadest possible basis of representative equality. The Republican party, he said, was responsible for the consummation of these measures. Some believed a constitutional amendment for securing the suffrage unnecessary, and that its ends could be effected by an act of Congress. Others believed that the subject was not within the proper scope of legislative power, and that equality of suffrage without distinction of race or color could be secured only by an amendment of the Constitution.[1] Those familiar with the debates which took place in the convention that framed the Constitution, and especially in the ratifying conventions, had evidence that the friends of the Constitution then believed that it gave the National Government power over the elective franchise sufficient to preserve its own existence independently of any action by the States. This must be true in the nature of the case, if the General Government was not a mere confederacy. If, as some maintained, the whole question of the suffrage was vested in the States, then, should they refuse to choose electors or to send members to Congress, or to choose Senators, they could bring the Government of the United States to an end.

The theory that the National Government could not control the suffrage for its own protection, was destructive of our existence as a people and a vestige of an ancient and

[1] Globe, 555.

false tradition. Nowhere did the Constitution tolerate the idea that the existence of the Government was at the mercy of the States. The control of elections, which the Constitution plainly gave to Congress, also clearly intimated the nature of its control over the suffrage. But did the States possess any powers except those given them by the Constitution? Was it not the established rule of construction that the National Government has no powers except those explicitly granted to it? Divested of all the theories and traditions put upon the Constitution by State-sovereignty men, could anything be more clear than that Congress had all the power which the States could exercise, except that of declaring where Senators should be chosen?[1] Therefore, when it was proved that a State has the right to decide who shall exercise the elective franchise, it was also proved that Congress might do the same thing under the provision empowering it to make any regulations it might choose on the subject of elections, except as to the place of choosing Senators. In the ratifying conventions of 1788, the ablest opponents of the Constitution had based their objections on the ground that it gave this power to Congress, and its defenders had never denied the soundness of the theory. It had the support of Hamilton and Madison in the Federalist, and of Wilson in the Federal Convention. Indeed, was not the substance of the whole matter so stated in Wilson's argument, "that it was not a crime to sow the seed of self-preservation in the Federal Government?" Four States, New Hampshire, Massachusetts, Rhode Island and New York, in ratifying the Constitution had demanded as an amendment, that the exercise of the right of Congress to regulate elections should be strictly limited. But not one of the twelve amendments submitted in 1789, and they

1 Mr. Boutwell, January 23, 1869. Globe, 556.

had been composed from the mass of recommendations made by the States, touched the question.[1]

The conclusion of the whole matter, therefore, in reference to the question of the suffrage, was clearly that the power to make regulations concerning elections was vested in the States; and, secondly, that the power of the General Government over the subject of the franchise was equally comprehensive. The theory of national existence compelled this conclusion. It, too, was supported by the debates in the Federal Convention and of the ratifying States. The explicit provision of the Constitution by which the United States guarantees to each State a republican form of government was further evidence of the right of the general government to regulate the suffrage. "The right of suffrage," said Wilson, in the Pennsylvania Convention, "is fundamental to republics."

No State which denied the elective franchise could be said to have a republican form of government. By this test the governments of Delaware, Kentucky, Maryland, Ohio and Pennsylvania, in 1868, were not republican. But it was asked here, whether the Constitution prohibited any State from regulating the right of suffrage? Did not the tenth amendment proposed by the State of Massachusetts in 1788 clearly intend to protect the rights not specially delegated to the United States, nor prohibited by it to the States as reserved to the States respectively or to the people? To this it was answered, that the power given to the States to regulate the time, place and manner of holding elections was specified and distinct, and was not disturbed by the tenth amendment, nor did that amendment affect the power of Congress to alter its State regulations. But if any doubt remained of the power of

[1] See the chapters on the ratification of the constitution for verification of Boutwell's assertions, Index, "Ratification."

Congress to regulate the suffrage, it should be dispelled by the Fourteenth Amendment. It defined citizens and made United States citizenship a privilege and an immunity which could not be abridged by any State. The term, *privilege*, as applied to members of the House, meant the same, as a matter of equal right among them, as when applied to citizens of the United States. Their privileges by the amendment were equal. It applied to all the people of the country, and Congress could not discriminate between the immunities and privileges of citizens whether white or black, native or naturalized.

But was the right to vote one of the privileges of a citizen? "To be a citizen," it was answered, "it was necessary that a person should be entitled to the enjoyment of those privileges and immunities on the same terms on which they are conferred upon other citizens." At this point the question was raised, whether, at the time of the adoption of the Fourteenth Amendment in Congress, it was not conceded that it would not confer political rights upon the negro, and that it recognized the right of the States to regulate the suffrage, without the control of Congress, but subject to the penalty that their representation might be curtailed if they should exclude persons of color from the right to vote. To this the same reply was given, that the right to vote is an essential quality of citizenship. If one man in a State had a right to vote, then every man, possessing like qualifications of education and property, had the same right. But, it was further asked, if the Fourteenth Amendment was intended to prevent a State from determining who should and who should not vote, why, when it provided that no State should make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, did it not add,

"nor make discrimination among the citizens of the State itself in the exercise of the right of suffrage?"[1]

The reason, replied Boutwell, was the plainest in the world: the clause was not necessary. The article as it stood provided that there could be no discrimination by the States among the citizens of the United States, who are as well citizens of the several States and are equally entitled to all the privileges of citizens. Moreover, the provision in the Fourteenth Amendment, on the apportionment of representatives, clearly showed, when taken in connection with what preceded it, how wholly without support was the doctrine that any State could abridge, or deny to a citizen, the right to vote. The penalty for doing so clearly intimated the nature of the denial. Kentucky, Maryland and Delaware, before the adoption of the amendment, denied the negro the right to vote, and for that reason they, and other States, it declared, should suffer in representation. Power was given to Congress to remedy the evil, and that power Congress was now invoked to adopt a distinct suffrage amendment. If the doctrine could be successfully maintained, that Congress could not legislate on the subject, the General Government would be put in an anomalous and inconsistent position. There were citizens in Kentucky and Maryland who, if the doctrine now set forth by the opponents of the proposed amendment was sound, were eligible to the office of President or Vice-President of the United States, and yet could not vote for representatives in Congress, or even for State, county or town officers. By the Constitution of the United States, a negro could be legally qualified for the Presidency, yet a State government might deny him the right to vote. The object of the proposed amendment was to

[1] The question was by James B. Beck, a representative from Kentucky. Globe, 559.

secure universal suffrage to all the adult male citizens of the United States. The power to pass it was clearly in the hands of Congress, and, as Boutwell and his political associates declared, it was in the hands of a Congress responsible to the Republican party, now in control of the Government.

There were but twenty-five States which could be relied on to ratify a suffrage amendment at this time; therefore three others must be secured. In entering upon the work of carrying through the amendment, the Republicans must expect prejudice and traditional opposition to negro suffrage. Nine-tenths of the party were in favor of manhood suffrage; it was the remaining tenth which constituted the great obstacle in the way of perfecting the measure. The great majority of the people, who on the third of November had supported General Grant for the Presidency, expected Congress to consummate this suffrage plan.[1] The proposed amendment would secure the people against any abridgment of their electoral power, either by the United States or by the States. This, said Boutwell, was a sufficient reason to justify its adoption. Having given the colored people in the States the power to vote, Congress would have created an element by which the amendment could be carried. In the northern and border States one hundred and fifty thousand citizens of the United States were still disfranchised. If the bill before the House became a law, these would be entitled to the right to vote and would rally to the support of the amendment, if enfranchised by the law.[2]

[1] Globe, 560.

[2] The number of negroes excluded from the franchise at this time were 1,700 in Connecticut, 10,000 in New York, 5,000 in New Jersey, 14,000 in Pennsylvania, 7,000 in Ohio, 24,000 in Missouri, 45,000 in Kentucky, 4,000 in Delaware, 35,000 in Maryland. Mr. Boutwell, Congressional Globe, January 23, 1869, p. 561.

If one hundred and fifty thousand black men could be disfranchised in ten States and a hundred, or a thousand, be made naturalized citizens in Rhode Island, where was the public safety? The foreigners naturalized in the country were at this time opposed to negro suffrage. If they saw that their own class might be disfranchised, what better security had they than the negro, who, as in Maryland, could not vote? Foreigners might at some day desire to settle in South Carolina, the majority of whose people were negroes. In view of the contingency that a State might disfranchise Irishmen, Germans or Scandinavians, would these foreign-born citizens hesitate in this crisis, when they had the power to settle the great question of human rights, not merely for negroes, but for white men, whether native or naturalized? There was no security while the great wrong of partial suffrage continued. But did Boutwell's amendment go far enough? Would it prevent any State from requiring a property or educational qualification of its voters? Several amendments were proposed to remedy this effect,[1] their common purpose being to prevent the exclusion of any male citizen, twenty-one years of age or over, from the right to vote, for any cause, except crime.[2]

[1] These were by James Brooks of New York, on the 23d of January; Globe, p. 561; John A. Bingham of Ohio, on the 27th; Globe, p. 638; Hamilton Ward of New York, Id.; Samuel Shellabarger of Ohio, Id. p. 639.

[2] As in Mr. Shellabarger's substitute: "No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of 21 years or over, and who is of sound mind, an equal vote at the elections in the States in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may engage hereafter in insurrection or rebellion against the United States and to such as shall be duly convicted of treason, felony or other infamous crime."

In urging his substitute for the Boutwell amendment Shellabarger, of Ohio, warned his fellow members against any act which might legalize the disfranchisement of the vast body of negroes at the South. If the amendment was made so that this could be done, it would be done, and loyal State governments in the late Confederate States would be instantly made impossible. Though Congress might say peace, the ugly fact would remain as stern, relentless and terrible as ever, that the rebel and master race at the South were not lovers of the Union, but of the "lost cause." While now they might mean submission, because they saw hope in no other course, yet Congress might so amend the Constitution as practically to put the loyal people of the Southern States under the mastery of those who mourned for that cause. The Boutwell amendment would enable them to disfranchise most of the colored people, by excluding a man from the ballot because he could not read. For centuries the colored race had been shut out from the light, and because for centuries they had been stolen property, they were poor; therefore, an educational or property qualification would practically disfranchise them:[1] a prophecy which was duly fulfilled thirty years later.[2]

But this was not the only defect in the proposed amendment. It added to the mischief which it aimed to remedy; for, by prohibiting a State from exercising the power of disfranchisement only on account of race, color

1 The reconstruction constitution of Mississippi of 1868 forbade an educational qualification.

2 This has been done in Mississippi by educational qualification, Article XII, Sections 241-242, constitution of 1890. In South Carolina by registry and property qualification, constitution of 1895, Article II, Sections 2-12; and in Louisiana by the constitution of 1898. See Official Journal of the Louisiana Convention, 1898, pp. 381-382.

or previous condition of slavery, it plainly led to the inference that the State was authorized to disfranchise upon any other grounds than those three, and, upon the well-known and universally recognized principle of law *expressio unius exclusio alterius*. Congress would thus make the Constitution worse, and hand the power of disfranchisement over to the States. The United States, having parted with all control over it, would surrender to the States the complete sovereignty over any matter essential to the very being of the National Government. The plainest elementary principle of free government demanded that there should be a "federal definition of federal electorship." Some of the Republican members feared that the time was inopportune for submitting the amendment. After reviewing the condition of the country, Shellabarger drew the conclusion that, on the contrary, it was the only time which could happen for years when Congress would have the favorable two-thirds for action; and, as its reconstruction laws had been accepted as permanent by the country and it had required the reconstructed States to submit to equal suffrage, it had control over the South, which, however temporary, would make the adoption of the proposed amendment secure. Either it must let the South disfranchise the colored race at will, or enfranchise the race itself; or compel the States to submit to a rule of elective franchise which it laid down. Because the measure was just, all the energies of good men throughout the land would be on its side, and its adoption might be confidently expected.[1]

The debate had developed two facts: a general agreement that it was desirable to submit a suffrage amendment; and a great difference of opinion respecting its provisions. The southern and border-State members gen-

[1] Appendix to the Globe, January 29, 1869, 91-100.

erally opposed the idea of permanently disfranchising those who had participated in the rebellion. The difficulty of providing against every evil which might arise from the administration of the law of suffrage in the southern States was clear to all. If the amendment substantially secured the principle, that the States did not absolutely control the question of suffrage, and, further, that by the fundamental law of the land the right could not be denied to the negro, it was enough. To load down the amendment with details would insure its rejection. Massachusetts, at this time, required an educational and Rhode Island a property qualification of the voters.[1] If the amendment forbade a State to impose such qualifications, it might confidently be expected that both these New England States would refuse to ratify. The people of New York, recently, by a large majority of over thirty thousand, had refused to abolish a discriminating property qualification for negro voters.[2]

The fate of the amendment, therefore, would depend upon its simplicity, and conciseness and its direct application to the African race. The House refused to lay the Boutwell resolution on the table,[3] and also to accept the amendments offered by Shellabarger and others;[4] and,

[1] To vote in Massachusetts the person must be able to "read the Constitution in the English language and write his name." Constitution, Article XX; amendment of 1857. In Rhode Island the voter was required to have paid a tax assessed upon property at the value of at least $134, which he possessed in his own right. Constitution of 1842, Article II, Sections 1 and 2. On the 4th of April, 1888, the constitution was amended so that this provision applied only to electors of city councilmen.

[2] For the account of the suffrage agitations in New York, at this time, see pp. 172, 173, (note) 339, 340.

[3] January 30, 1869, by a vote of 131 to 41; Globe, 742.

[4] Mr. Ward's amendment rejected by a vote of 160 to 24; Mr. Shellabarger's, by 126 to 61; Globe, 744.

with a slight verbal change, passed the Boutwell resolution by a vote of one hundred and fifty to forty-two.[1]

The Senate took up the House resolution on the third of February.[2] Senator Stewart, of Nevada, acting under the instruction of the Committee on the Judiciary, of which he was chairman, moved to amend the resolution by striking out the whole of its first section and substituting the provision that "the right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."[3] Williams of Oregon wished to insert "natural born" before citizens; Buckalew of Pennsylvania would have the submission of the amendment to the legislatures delayed until the people had chosen new Houses of Assembly; Howard of Michigan thought the language still too vague, and would have it express plainly, that citizens of the United States of African descent should have the same right to vote and hold office as other citizens; Corbett of Oregon would exclude Chinamen not born in this country and Indians not taxed; and Fowler, of Tennessee, would permanently exclude from voting and from office all citizens who had engaged in rebellion or insurrection.

The substitute for the House resolution recommended by the Judiciary Committee in no wise changed the issue, which, primarily, was a question of sovereignty. Should

[1] Globe, p. 745.

[2] The Resolution as it passed the House read: Section 1. The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States. Section 2. That Congress shall have power to enforce, by proper legislation, the provisions of this article.

[3] Globe, 828.

the elective franchise be regulated by the United States or by the several States? The difficulties in the way of the amendment, whether expressed in the language of the House or that of the Senate Committee, were serious and of long standing. The negro, save for a brief time in Tennessee, and for a slightly longer period in North Carolina, had never been a voter, in a southern State, and by the constitutional limitation of the right to white male citizens he was excluded from the franchise in all the northern States except four. Senators might well pause before venturing to propose to their constituents so radical a change in the fundamental law. Would Connecticut, a State whose constitution and laws explicitly excluded the black man from the right of suffrage, ratify an amendment which gave him both the right to vote and to hold office? Would any northern State, which, like Michigan and New York, had recently voted on the question of the extension of the suffrage to the negro on equal terms with the white man, now nullify that vote by ratifying the amendment? Was Congress justified in hoping that the States north of the Ohio, which had for years been unfriendly, if not hostile, to the free negro, would now bury their hostility and admit him to the right of suffrage and to hold office?

The minority in Congress, the Democratic members, confidently asserted that, if the amendment was made an issue at the polls it would be overwhelmingly defeated, and this confidence lay at the bottom of Senator Buckalew's proposition. The new members of assembly, fresh from the people would, he thought, undoubtedly regard their sentiments by voting the amendment down. Most of the State legislatures North and South at this time were Republican in both branches, and the Republicans in Congress were anxious to submit the amendment to them as

soon as possible. Thaddeus Stevens, during the debate on the Fourteenth Amendment, had repeatedly warned the House that the great work must be done at once, as the time was at hand when the Republican phalanx in both Houses would be broken, and ratification of the Fourteenth Amendment be impossible. The risk of defeat was greater now than when Stevens had spoken, for already that counter-revolution had set in, whose current, in a few years, was to sweep the Republicans from power, in the South, in many States at the North, and from Congress. Whatever was to be done in extending the suffrage to the negro must, therefore, be done quickly.

The whole purpose of the amendment was well expressed in the substitute which Senator Howard had suggested, that citizens of the United States of African descent should have the same right to vote and hold office as other citizens. Senator Morton, of Indiana, voiced the fears of many of his party when he said, that the language of the Stewart amendment could be practically disobeyed without establishing either a property qualification or an educational test. Like the makers of the Constitution, he was averse to putting the word "color" into it, or making any reference to slavery. In abolishing the institution, it had been necessary to be explicit, and the word "slavery" could not be avoided in the Thirteenth Amendment. Might not a State debar the negro from voting under the claim that he was deficient in natural intelligence, or incapable of improvement, or incompetent to take part in the administration of government? The whole provision of the proposed amendment might thus be overruled. For these reasons Senator Morton urged an affirmative definition of the suffrage somewhat as Howard of Michigan had suggested.[1]

[1] Globe, 863.

Though, at first thought, a definition of this kind seems easy to make, a little reflection will disclose the almost insuperable difficulties in the way. No affirmative definition, affecting such composite interests as the exercise of the suffrage and the right of candidacy for office in a dual government like our own, could possibly anticipate the changes of time. Clearly a positive definition must sooner or later become obsolete. It would be better to assert the power of Congress to regulate the right to vote or to hold office in any State, and thus keep the whole matter within the control of the National Government. This was suggested by Senator Williams of Oregon.[1] The amendment reported by the Committee on the Judiciary touched the suffrage question only in one aspect, he said, whereas Congress ought not to confine its vision to the present but look as far as possible into the future. Frequent changes in the fundamental law should be avoided, as they tended to destroy veneration and respect for it among the people. To guard against any violence to the rights of the African race,—and they were the immediate subject of the amendment,—the National Government should plainly reserve the right to interpose at any time on their behalf. An amendment to this effect would anticipate all possible contingencies and place the control of the franchise and all candidacy for office in the hands of the National Government.

But Senator Williams's proposition practically would change the basis of the suffrage, which, hitherto, had been exclusively under the control of the States, each acting for itself. Was the country prepared to authorize so radical a departure? Were the people of the several States willing to reverse their political practice and transfer the control of the suffrage to Congress? The Democratic mem-

[1] Globe, pp. 864, 899.

bers, and it may be said the entire Democratic party, answered unanimously in the negative, and neither the majority of the Republican leaders nor the rank and file of the party were prepared to answer in the affirmative. The innovation was too sweeping, except for the radical Republicans. Moreover, it reversed the practice of the country since the foundation of the National Government, and, indeed, even from a more remote past; for, in colonial times, the right to vote had been regulated by the several assemblies and not by Parliament. The momentum of political custom must always be taken into account when innovations are under discussion. It has often been asked in later times, why, when Congress was enacting the Fifteenth Amendment, it did not boldly and explicitly put the regulation of the elective franchise and of the right to hold office wholly under the control of the National Government?

The Fortieth Congress has been blamed, by those who call themselves Nationalists, because it neglected to perfect the work of reconstruction by passing a Fifteenth Amendment of this kind. The objections to Senator Williams' amendment are a sufficient reply to these later day criticisms. The Fortieth Congress contained an unusual number of men possessing wide political knowledge and experience in public affairs; it was not under the control of the Radicals, though these were present in respectable numbers and frequently gave utterance to their political faith with such eloquence and power that their extreme notions have become a great tradition in our history. The controlling minds of that Congress well knew the difficulties and dangers of attempting so radical a change in our political institutions as to give to the National Government the power to control the elective franchise and the right to hold office. The long established doctrine of

residuary sovereignty in the States checked every effort of the Republicans to effect the innovation. For nearly a hundred years that doctrine had gathered strength and at last had permeated nearly every State constitution and every election law in the country. It was too firmly embedded in the political mind and in the political traditions of the people to be obliterated by so sudden a procedure as an act of Congress in the form of a joint resolution, which, to become a part of the Constitution, must be ratified by three-fourths of the States. The civil war, though profoundly affecting the thought of the country, had not prepared the public mind to accept so radical an innovation.

The policy of the opposition was therefore clear; it could not defeat a suffrage amendment in some form, but it might largely determine the form. Fully conscious of the practical value of the doctrine of residuary sovereignty in the States, it could compel the Republicans to so word their amendment as to recognize that sovereignty, and thus, practically, continue to the States the right to regulate the elective franchise. Senator Sumner, who in his political creed paid little respect to dictionaries, warned the Senate against making any regulation of elections which would work the disfranchisement of the black race. The case, he said, was one of human rights, against State rights. The national idea as embodied in the Constitution forbade discrimination against any race, and he argued from our national history, that both the letter and spirit of the Constitution were universal and humane. Because the United States was empowered to guarantee to every State in the Union a republican form of government, it was empowered, he said, to enforce the guarantee, through the regulation of the elective franchise. He well knew that the opposition would insist on that defi-

nition of republican government found in the State constitutions at the time the national Constitution was adopted, but, by citations from the debates in the Federal Convention, from the Federalist, from the decisions of Chief-Justice Marshall, from the debates on Civil Rights Bill and on the Thirteenth and Fourteenth Amendments, he was satisfied that colored persons were citizens of the United States; that no State could abridge their privileges and immunities, and that the National Government had the original right to regulate the suffrage.

Sumner was a firm believer in the higher-law doctrine which Seward, now Secretary of State, had laid down, much to the consternation of the slavocrats, at the time of the admission of California. But the practical difficulty with this doctrine was that it went too far. Sumner, like Jefferson, considered the Constitution as of little more importance than an act of Congress, but the very broadness and comprehensiveness of his political views,—and their humanity was unbounded,—made them difficult to reduce to practice, and though he rarely supported measures not his own, the inferential bearing of his opinions practically hindered rather than helped the proposition which Senator Williams had made. Sumner's earnest plea for the equal treatment of the black and white races involved him now in an encounter with Senator Vickers, of Maryland, whom he forced to confess that, the two races, being different, could not exist prosperously and happily together, and that it would be better that the blacks should be sent to the tropics where they would thrive and develop all their faculties;[1] that ours was a white man's government, and discrimination against the black race was based upon a sound political philosophy. These opinions were not new; they had been held and

[1] Globe, 905.

often uttered by Senators from northern, middle and southern States alike; but, uttered at this time, they significantly gave voice to the political creed of the opposition, and clearly showed that all the changes which the last eight years had wrought had not changed the opinions of a powerful constituency. Their reiteration intensified the zeal of the Republicans to extend to the black race, ere it was too late, the protecting arm of the Constitution.

The Maryland Senator, unconsciously playing the part of a prophet, ridiculed Sumner's opinion that the extension of the right of suffrage to the negro would give the country peace. Such a violation of the Constitution, he declared, would be "but the beginning of strife;" and he contrasted the sentiments and the constitutional position of Sumner with the principles and doctrines of the constitutional law "which were promulgated by his illustrious predecessor, and which had secured to him the appellation of the expounder and defender of the Constitution." Not one word had Webster ever spoken, he said, on the latitudinarian views, which Sumner and other radicals now expressed on the subject of construing the Constitution.

Members, less learned but more tactful than Senator Sumner, who were willing to support a suffrage amendment, whether in the language of the House or of the Senate Committee, were well represented by Senator Willey of Connecticut. The main purpose of the amendment, he said, was clear—the enfranchisement of the colored race. As it was a maxim of the fathers that all just government must rest on the consent of the governed, the colored people of the country must be recognized as citizens, be held subject to its laws, and have a right to participate in the administration of its government. To tax them for its support and compel them to bear arms in its defense, would violate the principle which the Revolution itself had estab-

lished—that taxation without representation is tyranny. As long as the negro remained disfranchised, it was idle to hope for his advancement. The welfare of the white race, no less than that of his own, required his immediate admission into all the privileges and immunities of civil and political life. The amendment would settle, for all time, the question of negro suffrage in the insurgent States, where it had lately been extended under the pressure of congressional legislation; and would preclude the possibility of any future denial of the privilege by any change in their constitutions. In those States in which the colored race was numerous, the adoption of the amendment would remove a source of danger. Merely to emancipate the race and to exclude it from participation in political privileges must intensify a sense of degradation, breed a spirit of revolt and produce a degenerate and burdensome population. The enfranchisement of the negro would remove him from the arena of national politics, and relieve the nation from those conflicts of opinion and outbursts of passion which had retarded its prosperity ever since the Revolution. The right to vote was the only sure guarantee which the negro could have, in many sections of the country, for the enjoyment of his civil rights. Without it his freedom would be imperfect, "if not in peril of total overthrow." The ballot would be a safer shield than the laws. Moreover, the adoption of the amendment would place all the States on an equality. The exigency of imposing negro suffrage on the insurgent States had necessarily grown out of the late rebellion. Other States had involuntarily enfranchised the negro, and the adoption of the amendment would effect a like change in the remaining States. The political enfranchisement of the colored race was clearly demanded by national policy and expediency. But the demand was even louder and clearer in consideration of

justice to the negro, the principle of human liberty, and the spirit of Christian civilization.[1]

But these consistent and persuasive arguments had but little weight with the opposition; they clung to their prejudices and to the letter of the law. When the question of the abolition of the discriminating property qualification for negroes had been under discussion in the New York convention of 1868, Horatio Seymour, Samuel J. Tilden and other eminent Democrats, who were opposed to the measure, said little in debate, but marshaled the opposition so as to make the abolition a specific issue at the polls, being confident that the article on abolition would be rejected. Their confidence, as results proved, was well placed. Senator Buckalew, and several of his political associates, now attempted the same tactics in Congress, and urged that the amendment should be made an issue at the polls before being sent to the legislatures for ratification.[2] The late attitude of Pennsylvania toward negro suffrage convinced Buckalew that the proposed amendment would meet the fate of the negro suffrage clause in the recent New York elections. He saw no other way of insuring its defeat. No Republican Senator entertained an anxious fear for its adoption in most of the States, but many were unwilling to risk its fate in the hands of the legislatures, whose lower House had been freshly chosen, and particularly in New York, Ohio and Indiana, in which hostility to negro suffrage had lately cast an overwhelming vote. Buckalew based his objections on the original and exclusive right of each State to regulate the suffrage for itself.

The history of the suffrage in the United States disclosed an anomaly, which, as Howard of Michigan said, could not have escaped the attention of thoughtful men. All other governments regulated the suffrage, but no such faculty

[1] Globe, 911-912. [2] Globe, 912-913.

belonged to the Government of the United States. In this respect the National Government was entirely subject to the action of the States. The power to regulate the suffrage, as history shows, has ordinarily been exercised by the Government which is to be affected by it. The fathers, however, did not see fit to grant such authority to the Federal Government, and the proposed amendment was the first attempt to interfere with the right to control the suffrage long exercised by the States; and to "prescribe the qualifications of voters not only within their own limits but as to the Federal Government." Howard, who, it will be remembered, was one of the authors of the Fourteenth Amendment, objected to the language of the proposed Fifteenth, and for the reasons which Morton had already expressed. He preferred to give the suffrage and the right to hold office to the negro "in direct and plain terms so that 'he who runs may read,'" and he proposed, as a suitable form for the amendment that citizens of the United States of African descent should have the same right to vote and to hold office in the States and territories as other citizens who were electors of the most numerous branch of their legislatures. This language, he said, was both explicit and formal and met the emergency. The Republican party was under promise to guarantee, by Congress, equal suffrage to all loyal men at the South; the promise was in the platform on which Grant and Colfax had been elected.

Hendricks, of Indiana, promptly reminded him that another clause in that platform declared that the question of suffrage in all the loyal States properly belonged to the people of those States; a clear recognition of the true doctrine of the regulation of the suffrage. The word "properly," replied Howard, was used in the sense of "constitutional," and the party was not therefore guilty of perfidy

as Hendricks charged, in now formulating and passing the suffrage amendment.[1]

But Hendricks's charge was more serious than that of a broken platform; he maintained that the proposed amendment would be a violation of the original compact between the States, and would change the nature of the government. "I wish to ask the Senator," said Edmunds, of Vermont, "what, in his opinion as a real Democrat, is the true foundation of the Government, and whether he believes that universal suffrage is the true principle or not?" Hendricks, in reply, referred Edmunds to Jefferson's writings, but also gave an explicit answer; the extension of the suffrage to the colored people of the South was a change which had not been sufficiently tested to justify Congress in making a like change permanent for all the States. If any State chose to extend the suffrage to the negro, it had the right to do so, but this right did not lie in Congress. The negro race and the white could not mingle in the exercise of political power with good results to society; they differed not merely in physical appearance and conformation, but morally and intellectually. The black race did not bring any contribution to the mass of intelligence of the country, nor did Hendricks think it ever would. "The tendency of that race," said he, "is downward, when not supported by the intelligence of the white race."[2] His sharp accusation of perfidy in the Republican party, and of its violation of the Chicago platform, called forth several replies of which Senator Sawyer's, of South Carolina, doubtless satisfied his political associates, that the doctrine which the Republicans had laid down in its platform, the summer before—that the right of control of the suffrage properly belongs to the people of the States—was entirely true at the time and had been very

[1] Globe, 986. [2] Globe, 989.

properly expressed at Chicago, but that, nevertheless, it did not prevent Congress from making proposition for an amendment, in the usual constitutional form. The same argument, he said, would have prevented the passage of the Fourteenth Amendment.[1]

Several Senators now offered substitutes for the Stewart amendment, and all for the purpose of making the language clearer and more explicit in securing the right of suffrage to negroes. They differed from the Committee's amendment chiefly in arrangement, but most of them contained the well-known phrase of the Civil Rights Bill, on "race, color or previous condition of servitude." Senator Edmunds objected to the Stewart amendment because it left the descendants of every other race than the African entirely at the mercy of the States. "I think this proposition," said Senator Warner of Alabama, "to single out one race, is the weakest one that can be put before the country. If we want to strengthen it and give it a chance of adoption, we ought to amend it and insert the Irish and Germans." If the language suggested by Howard was to be adopted, that Senator was asked by Senator Sawyer of South Carolina, whether it would not be competent for any of the States, lately reconstructed, if they fell into the hands of the Democrats, to make such qualifications for the suffrage, without violation of the amendment, as would practically disfranchise four-fifths of the citizens of African descent. Whatever regulations or reconstruction might be established in this regard by a State, was the reply, "it must operate with equal severity upon the white and black races." But the Senate was loath to specify a particular race, in the Constitution, and Howard's amendment was at last rejected by a vote of more than two to one.[2]

[1] Globe, 997.

[2] 35 to 16; February 8, 1869. Globe, 1012.

This brought the Senate back to the Stewart amendment. Warner at once moved a substitute, which was really in the nature of new matter. In addition to the provision that the right of citizens of the United States to vote and to hold office should not be abridged by the United States, or by any State, on account of property, race, color or previous condition of servitude, the right to vote should be explicitly declared to be granted to every male citizen of the United States of the age of twenty-one years, or over, who, being of sound mind, had resided in the State for one year; but all who were guilty of engaging in insurrection or rebellion against the United States or who had been convicted of crime should be excepted. Williams at once pointed out the danger of providing in the Constitution that in any and all possible elections which might be held in the States for any purpose, every citizen should have an equal right to vote. It would produce great embarrassment in the States. Senator Sherman remarked that five different causes had at different times excluded from the right to vote in our own and in other countries, namely, race, property, religion, nativity and education, the last, in Massachusetts, and an experiment of our own. Would it not be wiser and better, he inquired, to exclude only for crime? To Senator Williams' objections to the Warner amendment, Howard now added another, that it made a naturalized citizen eligible to the Presidency, which would be a clear violation of the qualification annexed to that office by the fathers and would be dangerous to public safety.

Still another, and perhaps for the time a more serious objection, was pointed out by Willey of West Virginia, that the time had not yet come for universal amnesty and therefore that the amendment suggested by the Senator from Alabama, which provided practically that rebels might

hold office, was wholly objectionable. These objections and others, less serious, which were, however, enlarged upon, defeated the Warner amendment.[1]

Five substitutes for the Stewart amendment were now offered and rejected, and a sixth, by Sumner, that the right of citizens of the United States to vote and hold office should not be denied or abridged by the United States nor by any State, led to such a long debate of the question of naturalization and, prospectively, to a longer one on the race problem on the Pacific coast, that finding he had opened so vast a subject he withdrew his substitute. Sumner's colleague, Wilson, then offered as a substitute that no discrimination should be made in any State among the citizens of the United States in the exercise of the elective franchise or in the exercise of the right to hold office in any State, on account of race, color, nativity, property, education or religious creed, which he characterized as more comprehensive, full and just than any that had been offered. Sherman, who preferred the phraseology of this amendment to that offered by the Judiciary Committee, believed it wise to wipe out the multitude of discriminations in the constitutions of the several States on account of religious faith, property, color, or any cause other than crime. The Republican party, he said, could lay a broad and safe foundation for its political creed in universal suffrage, protecting all men of the proper age and with the proper residence, in the right to share the elective franchise and to hold office. The Pacific coast Senators insisted on the exclusion of Chinamen, but Cameron of Pennsylvania—not complaining of the session which had continued twenty-seven hours, during which nearly every Republican Senator had advocated some proposition of his own—now spoke humanely for all races and particularly for the

[1] 24 nays, 19 yeas; Globe, 1029.

Chinamen, because they had enriched the Pacific slope by their toil, and had made the great Pacific railroad "one of the greatest miracles of the world." His apology for the Chinaman fell upon deaf ears, for the majority, even of the Republican Senators, were opposed to extending the naturalization laws to him and, much more, to extending the suffrage.

Conkling of New York objected to Wilson's amendment, because its long list of discriminations would "revolutionize and undo the constitutions, enactments and the customs of the States." Coming from a Commonwealth which prescribed a property qualification for the negro, he well knew the great risk of defeat which the Wilson amendment would run in its legislature. To forbid an educational qualification might practically hand over the control of public affairs, in the State, to the ignorant, and defeat the very purpose of government. The Wilson amendment, he said, contained "needless and objectionable concomitants." Sherman, taking up Conkling's thought, enlarged upon the risk of defeat. Whatever form the amendment took, it would change the constitutions of at least thirty States in the Union, and, among others, that of Ohio. Negro suffrage was a sensitive question with its people. The great body of Republicans, in the State, favored repealing all discriminations on account of color, but the appeal to the people on this subject two years before had been defeated. Indeed no change that could be made in the Constitution was likely to excite so much popular feeling in that State as the one now proposed. In the more recent constitutions few tests for voters were required. Time had swept away property and religious qualifications, but had not swept away prejudice toward the African. It was expedient, therefore, for Congress to so word the amendment as to avoid antagonizing the people of the States. This could

be effected by using general language in giving the right to vote, but avoiding special reference to the African race. Massachusetts required the voter to be able to read and write, and New Hampshire required a man to be a Protestant before he could hold office; yet, in practice, these tests were often disregarded. The true principle was to refrain from discriminating between citizens on any account, excepting age, residence and sex. It ought to be regarded "as a fundamental principle of our government that all persons arriving at a certain age are entitled to equal rights." Ohio might reject the proposed amendment, because of the hostility of its people to negro suffrage; Massachusetts might reject it, because it forbade an educational qualification, and New Hampshire because it forbade a religious test. By the omission of offensive terms the language of the amendment might easily be made acceptable to these States.[1] But the Senate, now wearied by the extraordinary session, was anxious to effect an adjournment, and not anticipating the risks of defeat against which the New York and Ohio Senators had given warning, agreed to the Wilson amendment,[2] though by a small majority.

Buckalew now brought forward his proposition to delay submission of the amendment until new assemblies had been chosen, but it was quickly rejected by a vote of nearly three to one.[3] Senator Dixon, of Connecticut, then urged that the amendment be submitted to conventions instead of the State legislatures, but the suggestion was rejected.[4] At this point Morton, of Indiana, offered an additional article that the choice of presidential electors should be

[1] Globe, pp. 1038-1039.
[2] Yeas 31, nays 27; February 9, 1869. Globe, 1040.
[3] 43 nays, 13 yeas; Ib.
[4] 45 nays, 11 yeas; Ib.

made by popular vote.[1] His plan was to submit the articles separately to the legislatures, but it was rejected, though only by two votes.[2] Sumner then moved a substitute for the Stewart amendment, forbidding discrimination "under any pretense of race or color in any election; declaring all provisions in the State constitutions inconsistent with his amendment null and void, and fixing heavy penalties for its violation; but his amendment received only nine votes.

The joint resolution as modified was then ordered to be engrossed, when Senator Morton, who had voted against it, renewed his amendment for a popular election of presidential electors. Its main purpose, he said, was to avoid the danger of determining a close election by the appointees of a State legislature. At this time only one State, South Carolina, appointed its presidential electors, and this method had been abandoned in its proposed new constitution of 1868. The amendment, said Morton, would require the electors to be appointed directly by the people and would leave to Congress the mode of regulating that appointment or selection, as was the mode of regulating elections. The clear purpose of the amendment was in harmony with the resolution which had just been adopted, and was agreed to by a vote of nearly two to one.[3]

1 The Second Clause, First Section, Article II of the Constitution of the United States should be amended to read as follows: Each State shall appoint, by vote of the people thereof qualified to vote for representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which a State may be entitled in Congress, but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector; and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people. Globe, 1041.

2 Nays 29, yeas 27; Ib.

3 Yeas, 37; nays, 19; Globe, 1024.

The two amendments were then ordered to be engrossed. The joint resolution was read a third time, the roll was called, and the President of the Senate declared that, two-thirds having voted in the affirmative, it had passed.[1]

On the fifteenth, the House of Representatives suspended its rules and took up the Senate amendment to its own modification of the joint resolution.[2] Boutwell at once declared that the House proposition concerning the suffrage, sent up to the Senate, had been materially changed. No proposition in regard to electors had been considered in the House at all. He saw no way, except to refuse to concur in the action of the Senate, and therefore, moved for a Committee of Conference. Several members spoke briefly on the Senate amendments, but added nothing to what had already been said concerning them in the Upper House. By a vote of one hundred and thirty-three to thirty-seven, the House refused to concur in the amendments, and pursuant to Boutwell's motion, the Speaker appointed three managers as a Conference Committee on the part of the House.[3] On the seventeenth

1 Yeas 39, nays 16; February 10, 1869; Globe, 1044.

2 As amended by the Senate, the Joint Resolution now read: No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education or creed. Second amendment: Each State shall appoint, by the vote of the people thereof qualified to vote for representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector; and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people. Globe, February 15, 1869; p. 1224.

3 Mr. Boutwell, Mr. Shellabarger and Mr. Eldridge.

the Senate receded from its own resolution,[1] but by a slightly smaller majority, refused to concur in the original resolution of the House.[2] It appointed no Committee of Conference, and thus the long debate on the proposed Fifteenth Amendment seemed suddenly to come to an impotent conclusion. The failure of the amendment was attributable to the over-zeal and rather petty insistence of some highly influential Republicans that a particular phraseology should be used or the amendment should not pass—an illustration of selfishness common in legislative bodies. But the devoted friends of the principle embodied in a suffrage amendment, knowing well that the time for action was almost past, determined that it should not be abandoned.

1 Yeas 33, nays 22; Globe, 1295.
2 Yeas, 31; nays, 27; Globe, p. 1300.

CHAPTER V.

THE SUFFRAGE AMENDMENT REVIVED AND PASSED BY CONGRESS—ITS RATIFICATION AS THE FIFTEENTH AMENDMENT TO THE CONSTITUTION.

The President of the Senate had scarcely announced the vote before Stewart of Nevada was on his feet, moving that the Senate take up the joint resolution which, originating with Henderson of Missouri, had been considered in the Senate, between the fifteenth and twenty-eighth of January, and had been dropped for the House resolution.[1] The majority of the Republican Senators were quite as weary of the debate on the suffrage amendment as was the opposition, but repeated motions to adjourn were voted down. The recent vote in both Houses showed plainly that the adoption of an amendment depended almost wholly upon its phraseology, but to make this acceptable was quite as difficult as to satisfy the variable and uncertain temper of the Houses.

The Henderson amendment, now in the hands of Senator Stewart, was unsatisfactory to those who, like Howard, had already suggested one with a different phraseology, and he now declared that he could not vote for it because it proposed to confer upon Congress the power to prescribe the qualifications of voters and office-holders in the

[1] This was the Senate Joint Resolution No. 8, and read: Article XV. The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color or previous condition of servitude; that Congress shall have power to enforce this Article by appropriate legislation. On Senator Stewart's motion, the word "by" was inserted before the words "any State."

United States government and in the States—a most serious innovation in the Constitution. It opened a door to future Congressional legislation which might be very objectionable to the people, and, in his judgment, repealed the clauses of the Constitution forbidding any religious test as a qualification to any office or public trust. The implication was irresistible that, excepting as to race, color and previous condition of servitude, Congress might impose whatever qualifications it saw fit, and thus prescribe rules which would exclude every person in the States from the right of voting and holding office, who did not profess a particular religious creed, or who was not of a certain age, or had not been born in some particular locality; but the great objection to the amendment was its authorization of Congress to say that no one, except members of some particular religious sect should have the right to hold office. All necessary to be expressed was the equal right of the black man with the white, North and South, to vote and to hold office.

It was impossible to revive the old interest in the amendment, shown during the late debate, as was now evident from the absence of a quorum, yet the Senate, responsive to the vigorous championship of the amendment by the Nevada Senator and his followers, refused to adjourn. In vain did Bayard of Delaware protest against this tyranny of party. Amendment after amendment of the phraseology was rejected, till Howard at last renewed the substitute which he had lately offered, and as the Senate had once rejected the pending proposition, it might, as Williams now said, reject it again for the Howard amendment, for which he expressed his preference. The border State Senators were more active in their opposition to the amendment than were those from States further South, and, particularly, to the form in which Howard would cast

it. His amendment failed of adoption by only three votes,[1] and Hendricks, convinced that a suffrage amendment would pass finally in some form, now moved to add Buckalew's rejected amendment,—withholding the submission of the amendment until new State assemblies had been chosen,—but this suggestion was rejected by a larger vote than before.[2] Senator Dixon renewed his amendment for submitting the article to conventions instead of to the legislatures, but this, too, was rejected. The struggle now turned on the adoption of Howard's substitute, which Davis, of Kentucky, now moved to reconsider. The debate which followed brought out no new ideas, but the vote of nearly two to one against reconsideration defeated the substitute,[3] and plainly showed the drift of sentiment. All other amendments being rejected, the Henderson resolution, in its original form, was ordered to be engrossed, and, two-thirds of the Senate voting in the affirmative, it passed.[4]

On the twentieth the joint resolution was taken from the Speaker's table in the House and John A. Bingham, of Ohio, moved its amendment, so as to read, that the right of citizens of the United States to vote and to hold office should not be abridged or denied by any State on account of race, color, nativity, property, creed or previous condition of servitude; thus giving it the form substantially of the Senate amendment which the House had lately rejected. Shellabarger, of Ohio, like Senator Sherman, wished to give the right to vote to every male citizen of the United States of sound mind, twenty-one years of age or over, and to exclude from voting on account of crime, and,

[1] Yeas 22, nays 27; February 16, 1869; Globe, p. 1311.
[2] 40 to 12.
[3] Yeas, 16; nays, 29; absent, 21.
[4] Yeas, 35; nays, 11; absent, 20; February 17, 1869; Globe, 1318.

particularly, the crime of treason. General Butler, of Massachusetts, objected to the phraseology of the Senate resolution because it seemed to give color to the conclusion that there were other classes than the one implied—the negro—which might be deprived of the right to hold office; if Congress adopted the Senatorial provisions without a word of protest, the effect would be practically to legalize that which had been done in Georgia, in voting the colored man out of office. "The right to elect to office," said he, "carries with it the inalienable, indissoluble and indefeasible right to be elected to office," but, like Thaddeus Stevens, when moving the adoption of the Fourteenth Amendment when it came from the Senate, Butler now declared that he should vote to concur with the Senate resolution, because if the House did not accept it, he feared nothing else could be had, and it would be forever too late to pass an amendment.

Boutwell, who controlled the time of the House, objected less to the Senate resolution than to the modifications suggested by his colleagues, Bingham and Shellabarger, and it was with his consent that their amendments were offered. Bingham's defense of his amendment was based on his ideas of political equity. The amendment as it came from the Senate struck down, he said, the constitutions of Ohio and twenty other States which unjustly discriminated among citizens on account of color. His amendment would strike down as well the constitutions of States like Rhode Island, which wrongfully discriminated, by a property qualification, against naturalized citizens of the United States, and he declared that he would have inserted the word "education," had he not been convinced that the American people were so much devoted to "that chief defense of nations," that they would take good care of it. The principal speech from the opposition was made by

Judge Woodward, of Pennsylvania, who said little that had not already been said by Buckalew in the Senate, but enlarged upon what he considered the evil effect of the amendment in changing the fundamental law of Pennsylvania, and demanded that it should be submitted fairly to the people, as Buckalew and Hendricks had suggested. He could conceive, he said, of no profounder depth of self-degradation than to make the feeble, timid and ignorant descendants of a race of slaves, our voters and law-givers, our judges and representatives.[1] But the yeas and nays were demanded, and Bingham's amendment was agreed to,[2] and the amended resolution passed.[3]

The House now requested the concurrence of the Senate and on the twenty-second the new resolution was taken up by that body, on motion of Senator Stewart.[4] Buckalew pointed out that the resolution as it came from the House did not differ substantially from the one lately sent to the House by the Senate. The House then had taken exception to the Senate amendment, because it was too comprehensive. The Senate amendment differed from the House proposition by including the question of office-holding, and by naming nativity, property and creed. Stewart's motion to disagree to the House amendment and to ask a conference was carried, and he and Senators Conkling and Edmunds were appointed on the part of the Senate to confer upon the disagreeing votes of the two

[1] See his speech in the Appendix to the Globe, February 20, 1869, pp. 205-207.

[2] 92 yeas, 70 nays; 60 not voting.

[3] Yeas, 140; nays, 37; February 20, 1869; Globe, p. 1428.

[4] It read: Article XV. The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on account of race, color, nativity, property, creed or previous condition of servitude.

That Congress, by appropriate legislation, may enforce the provisions of this article.

Houses.[1] In the House, on motion of Boutwell, the rules were suspended, and the request of the Senate for a Committee of Conference was reciprocated, the Speaker appointing as conferees, Boutwell of Massachusetts, Bingham of Ohio, and General Logan of Illinois.

The meeting of the Conference Committeee wrought a compromise. The House should recede from its amendments and agree to the resolution of the Senate with one amendment—the words, "to hold office," should be stricken out. On the twenty-fifth Boutwell reported the result to the House: it was the original proposition of the Senate with three words stricken out, and the House agreed to the report of the Committee by a vote of one hundred and forty-five to forty-four, the Speaker, Colfax, voting in the affirmative.[2] On the following day the report was agreed to by two-thirds of the Senators present.[3] A concurrent resolution originating in the Senate and instructing the President to transmit the article forthwith to the executives of the several States, passed on the second of March. This act completed the work of Congress in passing the Fifteenth Amendment.

Of those who voted for the amendment in the form reported by the Conference Committee, no member had been longer identified with its spirit and purpose than George W. Julian, the Free Soil candidate for the Vice-Presidency in 1852. It had been his privilege and satisfaction to vote also for the Thirteenth and Fourteenth. With him now voted James M. Ashley of Ohio, whose patriotic zeal had carried through the Thirteenth, and Boutwell,

[1] The vote on the motion to disagree to the House amendment was 32 to 17; February 23. Globe, p. 1481.

[2] Globe, February 25; p. 1564.

[3] Yeas 39, nays 13, absent 14; the vote, it will be observed, was not two-thirds of the Senate: Globe, 1641.

Colfax, Windom, Garfield, Blaine and Logan were among the one hundred and forty-five who carried the resolution. In the Senate, all the Republican members were its supporters, but among those who voted for it at the last were Trumbull, Sherman, Conkling, Morrill and Fessenden. Bayard of Delaware and Hendricks of Indiana, later greatly distinguished in the annals of the Democratic party, now voted against the amendment as they had all along, in whatever form it had come up.

The passage of the Fifteenth Amendment on the twenty-seventh of February, 1869, was the culmination of a political movement which had begun nearly four years before, and was viewed by its supporters as the crowning work of reconstruction. The language which distinguishes it had been used in the Civil Rights Bill, and again in the enabling act for Wyoming of July, 1868, which forbade the territorial assembly at any time to abridge the right of suffrage or the right to hold office on account of race, color or previous condition of servitude.[1] The prospect of a speedy ratification of the amendment was not assuring. Within two years seven northern States had rejected negro suffrage, when made a distinctive issue at the polls. Pennsylvania and New Jersey had gone Democratic on this question in 1867; Minnesota had refused to strike the word "white" from its constitution,[2] and Connecticut and Ohio in the following year had voted against negro suffrage. In the late Presidential election, New Jersey had voted for Seymour and Blair and the Republicans had barely succeeded in securing a majority in its Lower House, its Senate being Democratic by nearly three to one. John Sherman had warned the Senate of possible defeat of

[1] Acts of July 25, 1868; Statutes at Large, XV, 180.

[2] At the election November 5, 1867; 28,790 votes against, and 27,479 for, striking out the word.

the amendment in Ohio, and the people of Michigan and New York had recently rejected free negro suffrage by a majority of nearly thirty thousand in each State.[1] In the uncertainty of the prospect, Congress determined to strengthen the chances of the amendment by making its adoption a condition of the admission of Virginia, Mississippi and Texas to federal representation.

Meanwhile the Texas convention had reassembled,[2] and almost its first act was to pass resolutions of condolence on the atrocious murder, during the session, of one of its members by a band of masked assassins, in the city of Jefferson.[3] This hint of the condition of affairs in the State grew into portentous proportions under the investigation of the Special Committee appointed by the convention to inquire into the enforcement of law and the preservation of order. It declared that in many counties law and order did not exist; that no fair and impartial election could be held in the State and that probably none could be held until several months after the inauguration of General Grant.[4] So alarming was the evidence before this committee that it formally submitted a resolution which confessed to the prevailing anarchy and requested Congress to give the convention the powers of a State legislature.[5]

[1] In Michigan, the vote was on abolishing the word "white" in the constitution and stood, 110,582 for and 71,733 against; and in New York, the vote against the new constitutional provision for the abolition of a property qualification for negroes was 232,403 against, and 249,802 for.

[2] Journal of the Reconstruction Convention which met at Austin, Texas, December 7, A. D. 1868, Second Session. Austin, Texas: Tracy, Siemering & Co., Printers, State Journal Office, 1870, 576 pages.

[3] Hon. George W. Smith: Journal, p. 7.

[4] See its report of December 23, 1868, in the Journal, pp. 107-109.

[5] Journal, p. 110.

The evidence on which it based its report was brought out more in detail by Major-General Reynolds, the military commander of the District, who declared that the murder of negroes was so common as to make it impossible to keep an accurate account of them. The State was practically in the hands of an "armed organization generally known as the 'Ku-Klux-Klan.'" So terrible was the reign of crime and lawlessness that official reports, far from exaggerating, did not tell the whole truth.[1] The evidence was cumulative. Governor Pease, in a letter to the chairman of the committee, corroborated its report and that of Reynolds, and added testimony of a most serious nature.[2] Even the minority report of the committee did not lessen the horrors of the situation. "Texas," so ran their report, "is not ready for civil State government; is in a state of outlawry; is a land of persecution and murder of loyal men, and disregard of law is the order of the day." The condition of the State was so deplorable, Congress should be asked for a territorial government.[3] Without waiting for the approval of Congress, the convention proceeded to act as a State legislature, and passed many ordinances with the object of bringing back the State to the observance of law and order. Its more radical members formally recorded their protest against the constitution it had adopted, because, they said, in extending the right of suffrage to those who had participated in the late rebellion, it had deliberately removed "every safeguard for the protection of the loyal voters, white and black." They accused the majority of repudiating the oath of loyalty, required by the reconstruction laws, and of striking out the system of registration which Congress had prescribed.[4]

1 Report of General Reynolds, Journal, pp. 110-112.
2 Journal, pp. 112-115.
3 Minority Report, Journal, pp. 125-128.
4 Journal, p. 518.

Seven other protests, signed, in the aggregate, by thirteen members, were on substantially the same ground.[1]

Scarcely less ominous were the reports from Virginia and Mississippi. The military commander at Richmond sent accounts of outrages at the hands of the Ku-Klux-Klan which disclosed the existence of as powerful and lawless a body as Reynolds reported in Texas,[2] and the evidence taken by the Committee of Reconstruction on affairs in Mississippi showed a like deplorable condition there.[3] From many other parts of the South came news of acts of violence perpetrated upon the black race. The evidence satisfied Congress that the provisional government of Virginia, Mississippi and Texas must be, as it were, purified, and a series of acts relating especially to these States were now passed. All persons holding office in the provisional governments of Virginia and Texas, who could not subscribe to the oath of loyalty under the act of July, 1862, were to be at once removed.[4] The President was authorized to submit the constitutions of the three States to their electors, and neither State should be admitted to representation in Congress until its legislature, lawfully organized, should ratify the Fifteenth Amendment.[5]

The reconstruction of Georgia was the subject of an act passed in December which gave special protection to the colored race.[6] On the fourteenth of May, 1869, President Grant issued a proclamation announcing that the consti-

[1] Journal, p. 520.

[2] For some account of the outrages in Virginia see H. R. Executive Document No. 95, 40th Congress, Third Session.

[3] For this evidence see House of Representatives Miscellaneous Document No. 53, 40th Congress, Third Session, 299 pages.

[4] Resolution of February 18, 1869: Statutes at Large, XV, 344.

[5] Act of April 10, 1869: Statutes at Large, Vol. XVI, p. 40.

[6] Id. pp. 59-60, see pages supra.

tution of Virginia would be submitted to the voters on the sixth of July, and that a separate vote would be taken on two of its clauses.[1] The election resulted in the adoption of the constitution and the rejection of both clauses.[2] The President issued a similar proclamation, on the thirteenth of July, designating the thirtieth of November as the time when the constitution of Mississippi should be submitted, and empowered the electors to cast a separate vote on the clause affecting disfranchisement; on that prescribing eligibility to office; on that forbidding the State to pledge its credit, and on that part of the oath respecting the exercise of the franchise by those who had signed the ordinance of secession.[3]

At the election, the constitution was ratified almost unanimously, and, with the exception of the clause forbidding the State to lend its credit to any person or corporation, all the provisions separately submitted were defeated. Against the section which disfranchised citizens for adhering to the Confederacy, the vote was almost unanimous.[4] The canvass in the State, though subordinated in a great

1 Statutes at Large, XVI, 1125-1126. The special clauses were the 4th clause of Section 1, Article III, on disfranchisement, and the 7th Section of Article III on the oath.

2 The number of registered voters was 149,781 white; 120,103 colored; 125,144 whites and 97,205 colored electors voted. The vote for the constitution was 210,585, and against it, 9,136. The vote for Clause 4, Section 1, Article III, was 84,410, and against it, 124,360. The vote for Section 7, Article III, was 83,458, and against it, 124,715. See Senate Executive Document No. 13, 41st Congress, Second Session, pp. 106-107.

3 See the proclamation, Statutes at Large, Vol. XVI, pp. 1127-1128. A separate vote was taken on a part of Section 3, of Article VII; on Section 5, of Article VII; on Section 5, of Article XII, and on Section 26, of Article XII. It was understood that Sections 4 to 15, inclusive, of Article XIII, were to be considered as forming no part of the constitution.

4 The constitution was ratified by a vote of 105,223 to 954.

measure to the policy of Congress, was conducted hopefully, if not aggressively, by the Republicans; but the Democratic party, at least its radical wing, offered no suggestion or advice as to the course proper for the people to pursue, but firm in its devotion to the "great doctrine of State rights," left the responsibility for the establishment of a Republican party in the State to rest where it properly belonged.[1] The result of the election was a Republican majority in both branches of the legislature. The Fourteenth and Fifteenth Amendments were ratified on the seventeenth of January, 1870.[2]

Virginia had ratified both on the eighth of October preceding.[3] Having thus complied with the conditions imposed upon them, these two States were admitted to representation in Congress, Virginia by the act of the twenty-sixth of January, and Mississippi by that of the twenty-third of February.[4] The President, by proclamation of the fifteenth of July, fixed the thirtieth of November as the time for submitting the constitution of Texas to its voters.[5] The election extended over four days and resulted

[1] Resolution of the Canton convention, October 20, 1869.

[2] The Fourteenth by a vote of 24 to 2 in the Senate and 79 to 2 in the House. The Fifteenth by the Senate unanimously, and by 79 to none in the House. Senate Executive Document No. 30, 41st Congress, Second Session. See the ratification also in Documentary History of the Constitution, II, p. 856.

[3] The Fourteenth Amendment was ratified in the Senate by a vote of 46 to 4; and in the House, by 126 to 6; the Fifteenth by a vote of 40 to 2 in the Senate, and by the House unanimously. See ratification in Senate Miscellaneous Document No. 63, 41st Congress, Second Session; and in Documentary History of the Constitution, II, p. 888.

[4] Act of January 26, 1870, Statutes at Large, Vol. XVI, pp. 62-63, of February 23, 1870: Ib. pp. 67-68. See also the supplementary act on the admission of Virginia of February 1, 1870, empowering persons either to take the oath or to affirm.

[5] See the Proclamation of July 15, 1869: Statutes at Large, p. 1129.

in a majority of over sixty-seven thousand for the constitution.[1] On the eighteenth of February, 1870, the legislature of the State by joint resolution, ratified the Thirteenth, Fourteenth and Fifteenth amendments.[2] On the thirtieth of March, the State was admitted to representation in Congress.[3] It had been unrepresented since the eleventh of July, 1861. With its return, all the States were again represented in Congress for the first time in nearly ten years.[4]

During the year which had elapsed between the adoption of the Henderson resolution by Congress and its ratification as the Fifteenth Amendment by Texas, it had been approved by the legislatures of twenty-eight States. Nevada, West Virginia, North Carolina, Louisiana, Illinois, Michigan, Wisconsin, Massachusetts, Maine, South Carolina, Pennsylvania and Arkansas had ratified within a month of its passage by Congress.[5] New York ratified on the fourteenth of April, but the new legislature elected in the autumn was Democratic in both branches, and on the first day of its session, responding to a resolution introduced by

1 72,366 for and 4,928 against it. H. R. Executive Document No. 265, 41st Congress, Second Session, p. 26.

2 Senate Miscellaneous Document No. 77, 41st Congress, Second Session; also Documentary History of the Constitution, II, p. 888. The Senate Document contains the constitution of Texas ratified at the polls and also some account of the election. The Journals of the Texas legislature, showing the votes on the three amendments, were destroyed in the burning of the capitol, 1884.

3 Act of March 30, 1870; Statutes at Large, Vol. XVI, pp. 80-81; Supplementary Act, May 4, 1870: Id. p. 96.

4 James Chestnut, Jr., James H. Hammond of South Carolina retired from the Senate November 10-11, 1860.

5 The votes are obtained from the archives of the several States, the acts of ratification are reprinted in Documentary History, II, Department of State. I am indebted to Mr. Theodore L. Cole of Washington, D. C., for aid in consulting the journals of

Tweed, of New York city, withdrew its assent.[1] In May, Ohio, fulfilling Senator Sherman's prophecy, rejected the amendment, but the legislature, again becoming Republican by a new election, ratified the amendment on the twenty-seventh of the following January.[2] Indiana and

some State legislatures, in the matter of the vote on the last three amendments.

Nevada, March 1, 1869, by 23 yeas to 16 nays, in the House; 13 yeas to 6 nays, in the Senate; see ratification in Doc. History, II, p. 797.

West Virginia, March 3, by a vote of 10 to 6, in the Senate, and of 22 to 19 in the House; Id. p. 803.

North Carolina, March 5; 40 to 8 in the Senate, and 87 to 20 in the House; Id. p. 800.

Louisiana, March 5; 18 to 3 in the Senate, and 55 to 9 in the House; 36 Republicans not voting; Id. p. 806.

Illinois, March 5; 17 to 7 in the Senate, and 54 to 28 in the House; Id. p. 808.

Michigan, March 8; 25 to 5 in the Senate, and 68 to 24 in the House; Id. p. 810.

Wisconsin, March 9; 15 to 11 in the Senate, 7 not voting; 63 to 29 in the House, 8 absent or not voting; Id. p. 812.

Massachusetts, March 12; 36 to 2 in the Senate, and 212 to 16 in the House; Id. p. 814.

Maine, March 12; 25 to 1 in the Senate, and 141 to 0 in the House; Id. p. 819.

South Carolina, March 16; 18 to 1 in the Senate, and 88 to 3 in the House; Id. p. 825.

Pennsylvania, March 26; 18 to 15 in the Senate, and 61 to 38 in the House; Id. p. 828.

Arkansas, March 30; almost unanimously; Id. p. 831.

1 New York ratified in the assembly March 17, 1869; 72 yeas to 47 nays; and in the Senate April 14; 17 yeas to 15 nays. On the withdrawal of the ratification, the vote in the Senate, January 5, 1870, was 16 yeas to 13 nays, and in the assembly, 69 yeas to 59 nays.

2 Ohio, May 4, 1869, rejected by a vote of 19 to 14 in the Senate and 47 to 36 in the House. On the 27th of January, 1870, it ratified by a vote of 19 to 18 in the Senate, and of 62 to 36 in the House: Documentary History, II, p. 870. See the resolution in the Ohio laws, 1869, pp. 424-425.

Connecticut ratified in May;[1] Florida in June;[2] New Hampshire in July;[3] Vermont followed Virginia in October,[4] and Alabama ratified in November,[5] the last ratification of the year. Missouri preceded Mississippi by ten days, in January,[6] and Rhode Island, Kansas and Ohio followed it.[7] Texas was preceded by Georgia, Iowa and

[1] A joint resolution for the ratification of the amendment was introduced in the Indiana Senate on the 13th of May. Seventeen Democratic senators and 36 representatives had resigned on the 4th of March, thus preventing a quorum in both branches. The opponents to the amendment—and they included some Republicans—claimed that the question of its ratification had not been before the people at the time of their election. The Speaker ruled that there was a quorum of de facto members present, though on the 14th of May 42 members of the House had resigned. The appeal of the two Democratic representatives who remained was laid on the table and the resolution for the ratification carried by a vote of 54 to 0, in the House, May 14; it had been carried in the Senate, May 13, by a vote of 27 to 1. Documentary History, II, p. 836.

Connecticut, May 19; 12 to 5 in the Senate, May 7; 4 absent or not voting; 126 to 104 in the House, May 13; 7 absent or not voting: Documentary History, II, p. 839.

[2] Florida, June 15; 13 to 8 in the Senate; 26 to 13 in the House: Documentary History, II, p. 841.

[3] New Hampshire, July 7; in the Senate without division; in the House, 187 to 131, June 24: Documentary History, II, p. 843.

[4] Vermont, October 21; in the Senate unanimously; in the House, 196 to 12: Documentary History, II, p. 848.

[5] Alabama, November 24; in the Senate, 24 to 0; in the House, 69 to 16: Documentary History, II, p. 850.

[6] Missouri, January 10, 1870; in the Senate, 21 yeas to 3 nays, 10 absent; in the House, 86 yeas, 34 nays, 12 absent: Documentary History, II, p. 853. For Mississippi, see p. 451, ante.

[7] Rhode Island, January 18; in the Senate, 23 to 12; in the House, 57 to 9: Documentary History, II, p. 863.

Kansas, January 19; in the Senate, unanimously; 25 ayes; in the House, January 18, 1870, 77 ayes to 12 nays; two members were allowed, later, to record their votes in the affirmative. See the Protests that the Fifteenth Amendment had not been made a direct issue at the polls. House Journal, pp. 135, 137. Documentary History, II, p. 868.

Nebraska in February,[1] and followed by Minnesota, whose vote made the full number required by the Constitution.[2] On the thirtieth of March, Secretary Seward, by proclamation, announced that the amendment had become a part of the Constitution.[3] Nearly a year later, on the twenty-first of February, New Jersey ratified.[4]

California, Delaware, Kentucky, Maryland, Oregon[5] and Tennessee rejected the amendment. The reason for their action was doubtless expressed by the general assembly of Tennessee, that the amendment was unnecessary, as the States were fully empowered to extend the suffrage to whom they pleased; that it had been passed and submitted at a time when the public mind was not in a condition to properly weigh and consider the question; that it was class legislature of an odious character, making the colored race the especial ward and favorite of the country; that it was "incompetent," because it would become a bone of contention in the future and a subject of ceaseless agitation;

[1] Georgia, February 2; in the Senate, 26 to 10; in the House, 55 to 29: Documentary History, II, p. 875.

Iowa, February 3; in the Senate, January 26, 42 yeas, 7 nays, 1 not voting; this was the vote on agreeing to the report of the committee of conference on the resolution for ratification. On the 20th of January, the vote in the House, on its own resolution for ratification, was 84 yeas, 12 nays, 4 absent or not voting. The vote in the House on the report of the committee of conference is not recorded: Documentary History, II, p. 877.

Minnesota, February 19, 1870; Senate, January 12, 1870, 13 ayes to 6 nays; House, January 13th, 28 ayes, 15 nays: Documentary History, II, p. 891.

Nebraska, February 17; in the Senate, 11 to 1; in the House, 29 to 4: Documentary History, II, p. 879.

[2] February 19: Documentary History, II, p. 891.

[3] See the Proclamation in Documentary History, II, p. 893.

[4] New Jersey, February 21, 1871: Documentary History, II, p. 896.

[5] In the House, October 26, 1870; for rejection, 24; against it, 14; in the Senate, same time for rejection, 16; against it, 5.

that it had been submitted for voluntary ratification in some States, but in others its ratification had been compelled by military authority. The substance of all objections was given in one clause of the resolution by which it was rejected by the Tennessee assembly; that it led inevitably to a concession of all sovereign power to the legislative branch of the Federal Government.[1] The legislatures of Delaware and Kentucky agreed that the amendment would be "utterly destructive to State rights."[2]

If we consider for a moment the history of the suffrage in America, down to the time of the ratification of the Fifteenth Amendment, we can better understand the almost insuperable difficulties in the way of its ratification.[3]

The history of the American governments down to the time of the reconstruction acts of Congress, while of many races, was by the white man and for the white man. Until the passage of those acts, the constitutions, the laws and the public sentiment of thirty-three of the thirty-seven States in the Union were not merely oblivious of the negro, but hostile to him as a voter. Even in New Hampshire, Vermont, Massachusetts or New York, in which States a free person of color[4] might become a voter, a negro was

[1] See the proceedings of the Tennessee General Assembly, House of Representatives, pp. 185-186; November 15, 1869, and of the Senate, February 24, 1870.

[2] See Kentucky House Journal, 1869, pp. 74-76, 774-775; and Senate Journal, pp. 623-628. And the laws of Delaware for the resolution of its legislature, March 18, 1869; Vol. XIII, Part 1, pp. 653-654. For the joint resolution of the Maryland legislature rejecting the amendment, see Maryland Laws of 1870, p. 931.

[3] The history of the elective franchise is narrated in my Constitutional History of the American People, 1776-1850, 2 Vols. Harper & Brothers, 1898.

[4] For an account of the civil and political condition of free persons of color, in the United States in colonial times and down to the year 1850, see Vol. I, Chapter XII, of my Constitutional History of the American People, 1776-1850.

rarely seen at the polls, and no community could be found that would for a moment think of electing one to the humblest office. When the Free Soil party, in convention at Pittsburg, on the eleventh of August, 1852, chose Frederick Douglass for its secretary, the innovation of honoring a person of negro blood began at the North, and, it may be said, ended also, for the North has never held to the precedent. The Whigs and the Democrats of the country at this time considered the delegates who nominated John P. Hale of New Hampshire for President, and George W. Julian of Indiana for Vice-President, on an abolition platform, whose chief cornerstone was the declaration that the government had no more power to make a slave than to make a king—as a coterie of fanatics the dangerous character of whose principles was thus personified in the choice of a run-away slave as recording secretary. The reconstruction acts had conferred the right to vote on the negroes of the South, at the point of the bayonet, but would the right be suffered to remain, after the bayonets were withdrawn? This was the crucial question which the Fifteenth Amendment was framed to answer, forever. The franchise must be placed beyond repeal, now that it had been given the negro. No State must be allowed to retain the word "white" in its constitution, as a description of the elector; no law must be passed, either by a State or by the United States, which would discriminate on account of race, color or previous condition of servitude. Public opinion, the most stubborn of all opinions, must be changed and changed radically. The practice of the American people during the entire period of their history must be changed, yea, more, corrected to conform to the rights of man. Even now, after many years' familiarity with negro suffrage, the boldness of the Republican program of 1868 seems startling. But the party did not hesitate to make the

extension of the suffrage to the negro the great national issue in the Presidential campaign of that year.

Grant and Colfax were nominated on a platform which explicitly approved the reconstruction policy of Congress, and Seymour and Blair stood no less clearly for its disapproval. The New York platform plainly pronounced them usurpations—unconstitutional, revolutionary and void, and further declared that ever since the people of the United States had thrown off subjection to the British Crown, the privilege and trust of the suffrage had belonged to the several States, and had been granted, regulated and exclusively controlled by them. Any attempt, by Congress, to deprive a State of this right or to interfere with its exercise, was a flagrant usurpation of power which could find no warrant in the Constitution, and which, if sanctioned by the people, would subvert our form of government, and necessarily end in a single, centralized and consolidated government in which the separate existence of the States would be entirely absorbed. An unqualified despotism would be established in place of a federal union of co-equal States.[1] On the issues of reconstruction—and it included negro suffrage—the two parties went to the country. That the extension of the suffrage to the negro was the great political issue of the hour was clearly stated in General Blair's letter of acceptance.[2]

[1] Official Proceedings of the National Democratic Convention, held at New York, July 4-9, 1868. Boston: Rockwell & Rollins, Printers, 1868, p. 60.

[2] "Those who seek to restore the Constitution by executing the will of the people condemn the reconstruction acts already pronounced in the elections of last year (and which will, I am convinced, be still more emphatically expressed by the election of the Democratic candidate as President of the United States), are denounced as revolutionists by the partisans of this vindictive Congress. Negro suffrage (which the popular vote of New York, New Jersey, Pennsylvania, Ohio, Michigan, Kentucky and other

The vote for Seymour and Blair, which was two-fifths of the popular vote of the country at the time, may be said to indicate fairly the strength of the opposition to the suffrage amendment.[1] The margin of strength for it, therefore, was narrow. It may be said to have won by the power of three hundred thousand votes in a total of nearly six millions. But the Presidential vote in 1868, recorded far more than the triumph of a party; it was the triumph of a principle. It put on record a decree which reversed the practice of government in America, State and National, and overthrew the traditions of the people for two centuries and a half. Henceforth it should not be said that government in America was for white men only.[2] Henceforth political rights in this country should be recognized without discrimination on account of race, color or previous condition of servitude. The Fifteenth Amendment obliterated the word "white" from all the American constitutions.[3]

Of those of the thirty-seven States which composed the Union at the time of its ratification all save six used the word "white" as descriptive of the elector. Five of the

States has condemned as expressly against the letter of the Constitution) must stand because their senators and representatives have willed it. If the people shall again condemn these atrocious measures by the election of the Democratic candidate for President, they must not be disturbed." Proceedings of the New York Convention, p. 181.

[1] Seymour and Blair received 2,709,613; Grant and Colfax 3,150,071. The vote in the electoral college was 214 for Grant and Colfax, and 80, including the vote of Georgia, for Seymour and Blair.

[2] For a more particular account of the suffrage, down to 1850, see the Constitutional History of the American People, 1776-1850, Vol. I, Chapters vii and xii; and Vol. II, Chapter xv.

[3] Ex parte Yarborough, 110 U. S. 651; U. S. vs. Reese, 92 U. S. 214.

six were in New England,[1] and the sixth, Kansas, was the child of New England in the West. The use of the word "white" in describing the elector in nearly every constitution adopted in America before 1868, suggests how deeply prejudice against the negro was embedded in the public mind. The reconstruction constitutions of 1867 and 1868 omitted the word[2] and it was discontinued in the Northern States as they adopted new constitutions or amended the suffrage clause in their old ones.[3] It is a suggestive evidence of the persistency of racial prejudice that most of the States delayed to obliterate the word; that when the century closed the discriminating word still remained in the constitutions of five States.[4] Like the skeleton embedded in the rocks, it suggests a monster of ancient days.

Meanwhile reports of atrocities in the South toward the negro race were increasing in number, and the evidence that the amendment was practically ignored there was overwhelming. To remedy the evil, Congress, just two months after the proclamation of the Secretary of State that the amendment had been ratified and, under authority of its second clause, passed an act to enforce the right of citizens of the United States to vote in the several States of the Union. From its opponents it received the name of the Force Bill, and provided that all citizens of

[1] Maine, 1820; New Hampshire, 1776, 1784 and 1792; Vermont, 1776, 1786, 1791 and 1793; Massachusetts, 1780, Rhode Island, 1818.

[2] These were in Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Mississippi, Arkansas and Texas.

[3] It was omitted in the new constitutions of Illinois and Tennessee, 1870; West Virginia of 1872; Pennsylvania, 1873; The New York amendment of 1874; New Jersey amendment, 1875; Missouri, 1875; Connecticut amendment, 1876; California, 1880; Indiana amendment of 1881; Kentucky constitution, 1890; Delaware Constitution, 1897.

[4] Maryland, 1867; Ohio, 1851; Michigan, 1850; Nevada, 1864; Oregon, 1835.

the United States, otherwise qualified by law to vote at any election, should have the right to do so without the discrimination of race, color or previous condition of servitude, or of any constitution, law or custom of any State or territory. Whatever prerequisite for voting might be required of the voter should apply alike to both races and the offer to perform any act required for voting should be deemed a lawful performance of that act and entitle a person to vote. It fixed heavy penalties upon election officers in case of neglect to receive the votes of qualified persons, and also for obstructing the voter in the exercise of his right, or attempting to intimidate him by threats or bribery. It gave the District Courts of the United States, concurrently with the Circuit Courts, jurisdiction over all offenses under the act, and excluded the State Courts from all jurisdiction over them. It placed the military power of the United States at the disposition of the marshal and deputy marshal, who were sworn to obey the warrants and precepts of these Courts.

All persons within the jurisdiction of the United States were declared to have the same right, in every State and territory, to the full and equal benefit of the laws enjoyed by white citizens. The Civil Rights Bill of 1866 was reenacted, and persons who were deprived of an election to any office, except presidential elector, representatives of Congress and members of State legislatures, by reason of the denial to any citizen who had offered to vote, of his right to vote on account of race, color or previous condition of servitude, were empowered to bring suit for the recovery of the possession of the office to which they had been chosen.[1] The constitutionality of this act, and indeed that of all the reconstruction acts, was denied by most of those who had opposed them. On the ground of unconsti-

[1] May 31, 1870.

tutionality, the Fourteenth Amendment had at first been rejected by the States lately in rebellion and the unconstitutionality of the Fifteenth was held by Delaware, Maryland and Kentucky as sufficient cause for its rejection. In all the State campaigns prior to the ratification of these amendments, their constitutionality was the subject of ceaseless exposition by the Democrats, and the declaration in the New York platform on which Seymour and Blair were nominated was merely the survival of similar declarations in the State platforms of the party.

With the adoption of the Fifteenth Amendment, the Constitution as a piece of political work extending into two centuries, during its formative period, was completed, but before examining the trend of interpretation in later time, let us briefly review the sources and the authorship of the Constitution.

CHAPTER VI.

THE SOURCES AND AUTHORSHIP OF THE CONSTITUTION.

The Constitution was in process of formation during three periods, which covered, in the aggregate, more than eighty years, but the actual time consumed in the perfection of the original instrument and in the discussion of the amendments and their ratification by the States was twenty-three years and a half.[1] The long interval between the adoption of the Twelfth Amendment, in 1804, and the initiation of the Thirteenth, in 1863, coincided closely with the period of Democratic supremacy. These sixty years of power terminated with Buchanan's administration, and the adoption in Congress of the proposed amendment of 1861, making slavery perpetual, to which, in the form of a joint resolution, President Buchanan attached his signature, probably his last official act.[2] There then followed the fearful struggle to determine whether the Union could remain half slave and half free, culminating, unexpectedly, in the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which abolished slavery, raised the former slaves to citizenship and forbade discrimination against citizens in the exercise of the suffrage on account of race, color or previous condition of servitude.

These amendments effected more radical changes in the original instrument than the twelve which preceded them. The Constitution, as it left the hands of its framers, in

[1] The Federal Convention began its work May 25, 1787; the twelfth amendment was proclaimed a part of the Constitution, September 25, 1804. Initial proceedings in the Thirteenth Amendment began in Congress, December 14, 1863; the Fifteenth Amendment was ratified by Texas, February 18, 1870.

[2] See Vol. II, p. 678.

1787, was a composite instrument. To attempt to trace all its provisions to their sources would carry us back into a remote past and bring us to constitutions of government in force at various times from the dawn of history: for all governments which men have established possess qualities in common. It is not my purpose to pursue so hopeless a search, but rather to trace the provisions of the Constitution to those immediate sources which may be clearly established by the records, and which, it may be said, are chiefly American. The immediate source of the Constitution was the fifteen articles of the Virginia Plan read to the Federal Convention by Governor Randolph on the twenty-ninth of May, 1787, of the origin of which plan we are not directly informed, but are doubtless justified in attributing it to James Madison. Its essential points had been advocated by him in a letter to Jefferson in March, and in another to Washington in April, preceding; both written from New York, where Madison was in attendance on Congress.[1] His thought was repeated by Washington in letters to intimate and influential friends, and, through them, was spread more or less broadcast over the land.[2] Yet, long before this, Washington had written that without an alteration in our political creed, the superstructure which had been seven years in raising, at the expense of so much treasure and blood, must fall, as the country was fast verging to anarchy and confusion.[3] But this confession of the need of a National Government was not the first; for Hamilton in 1780, in a letter to James Duane, then a member to Congress from New York, had shown the defects of the Articles of Confederation, and the absolute

[1] Madison to Jefferson, March 9, 1787: Works, I, 285; Madison to Washington, April 16: Id. p. 287.

[2] See Washington to Madison, March 31, 1787; Ford's Washington, XI, 130; to David Stuart, July 1st; Id. p. 159.

[3] Washington to Madison, November 5, 1786; Ford, XI, 80.

necessity of clothing the General Government with sovereign powers.[1] Nor did Hamilton's efforts cease with the writing of this letter, for two years later he was instrumental in bringing about the adoption of resolutions, by the New York legislature, which declared the essential defects of the Articles, and recommended a general convention of the States to revise and amend them.[2] All these suggestions point to a growing conviction in the country that a more perfect Union was necessary. The conviction was expressed in the letters of other, though less distinguished, men, such as Webster and Drayton. The essential character of Chief-Justice Drayton's idea of a General Government may be inferred from a passage in his speech, delivered January twentieth, 1778, before the assembly of South Carolina on the adoption of the Articles of Confederation that "the sovereignty of the States should be restricted only in case of absolute necessity, and that Congress has no power is clearly defined in the nature of its operation."[3] Undoubtedly the reform of the Union was a theme of common discussion among thoughtful Americans. "The design and end of government," wrote Thomas Paine, in 1776, "is freedom and security," and the famous essay, in which the words occur, written at the instigation of Franklin, may justly be said to bear scarcely less close relations to the Constitution than it bore to the Declaration of Independence. It expressed the longing of the country, and its humane philosophy was at last incorporated in our supreme law.

The fifteen articles of the Virginia Plan were probably worked out by Madison and his colleagues in the Virginia

[1] Hamilton to Duane, September, 1780; Hamilton's Hamilton, I, 284-305.

[2] New York Journals of the Senate and Assembly, July 20-21, 1782; Kent's Commentaries, 12th Edition, I, 218.

[3] Principles and Acts of the Revolution; Niles, 101-104.

delegation, with the aid of early arriving delegates from other States, in their informal meetings at Francis's Hotel, after the tenth of May and before the meeting of the Convention on the twenty-fifth, and while yet a quorum of the delegates had not arrived. The Virginia Plan was discussed in Committee of the Whole till the thirteenth of June, when it was reported in nineteen articles. On the fifteenth, Paterson of New Jersey, submitted a General Plan in nine articles, and, three days later, Hamilton read his Sketch of a plan in eleven. On the twenty-ninth of May, Charles Pinckney of South Carolina is credited with having submitted a Plan the contents of which are not known, for, as remarked by Madison, the Plan attributed to him contains some provisions of which he highly disapproved and others which were not worked out by the Convention until toward its close.[1] The Committee of the Whole continued the discussion of the Virginia Plan till the twenty-sixth of July, when the twenty-three resolutions into which that plan had expanded, together with Patterson and Pinckney's drafts, were referred to the Committee of Detail, called also the Committee of Five, chosen by ballot and consisting of Rutledge, Randolph, Gorham, Ellsworth and Wilson, who appointed on the twenty-fourth of July, were instructed to consider all the provisions thus far worked out, excepting those relating to the Executive.[2]

This committee, on the sixth of August, reported a draft of a Constitution, in twenty-three articles. Many clauses had provoked long discussion and developed such differences of opinion that their consideration had been postponed. They involved the fate of the whole work, and, together with such parts of reports as had not been acted on, they were referred, on the last day of August, to a

[1] Elliot, V, 578.
[2] Journal, p. 216.

Committee of Eleven, one from each State, also chosen by ballot.[1] This committee, of which Brearly of New Jersey was chairman, first reported on the first of September, and made the last of its suggestions on the fifth. On the eighth was chosen the Committee of Revision, consisting of Johnson, Hamilton, Gouverneur Morris, Madison and King, who turned the work before it over to Morris, and on the twelfth reported the Constitution. It will soon be seen that not only the arrangement and language but many of the provisions of the Constitution are to be attributed to these three committees.

The articles and clauses of the Constitution were not worked out in the order in which they now stand. Both the order and much of the phraseology were given by the Committee on Revision and Style. The Preamble,[2] which by party policy and administrative necessity soon became an important index to the scope and meaning of the Constitution, seems not to have been the subject of much discussion. It first appeared in the report of the Committee of Detail on the sixth of August,[3] and was agreed to without opposition on the following day. Its opening phrase then read: "We the people of the States," which was changed to "the People of the United States," by the Committee on Arrangement and Style, September twelfth. It does not appear that a preamble such as was found to the

[1] The members of this committee were Gilman, King, Sherman, Brearly, Gouverneur Morris, Dickinson, Carroll, Madison, Williamson, Butler and Baldwin. Elliot, V, 503.

[2] The text of the Constitution here reprinted follows the original in the State Department: We, the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

[3] Elliot, V, 376.

Articles of Confederation and to several of the State constitutions in the eighteenth century was considered then as anything more than an introduction to the instrument proper.

The phrases which have made the Preamble historic, had long been current when Gouverneur Morris arranged them. The first Virginia charter spoke of "the liberties of natural born Englishmen;"[1] and the Mayflower Compact provided for laws that should be "for the general good of the colony."[2] The New England Union of 1643 purported to be "a firme perpetuall league of friendship and amytie."[3] Penn's plan of 1696 for colonial union declared that the purpose of the gathering of the deputies would be for "the public tranquillity and safety,"[4] and the plan of the Lords of Trade of the same year proposed a union "for mutual defence and common security."[5] The plan of union proposed by "a Virginian" in 1701, was based on "the public welfare"[6] and in the same year William Penn confirmed the liberty of the freemen, planters and adventurers of Delaware "for the further well-being and good government of the province." Daniel Cox, twenty-one years later, advocated a general council for America, consisting of two deputies from each province "to consult and advise for the good of the whole."[7] And for "the union, stability and good of the whole," Doctor Samuel Johnson, in 1760, advocated his ecclesiastical plan for the government of the colonies.[8]

It is, however, in Franklin's plan of July, 1775, that we find a surer parentage for the best known clause of the Preamble. The States, he said, should form a "firm

1 Charter of 1605.
2 1620.
3 Article II, Carson, II, 440.
4 Article I, Carson, II, 450.
5 Article II, Ib. 451.
6 Ib. p. 458.
7 Carson, II, 465.
8 Ib. 484.

league of friendship with each other binding on those and their posterity for their common defence against their enemies, for the security of their liberties and properties, the safety of their persons and families and their mutual and general welfare." Congress should make such general ordinances as, "though necessary to the general welfare," the particular assemblies were incompetent to make, such as those relating "to our general commerce or general currency; the establishing of posts; and the regulation of our common forces." Moreover, "all charges of wars and all other general expenses incurred for the common welfare" should be defrayed out of the "common treasury."[1] The preamble of the constitution of New Jersey, of 1776, spoke of the State governments which Congress had advised as such as should best conduce to the happiness and safety of the States "and the well-being of America in general," and the preamble of the constitution of Pennsylvania of the same year, which was largely the work of Franklin, declared the purpose of the new government to be to "promote the general happiness of the people of this State and their posterity."

This constitution also declared that government is "for the common benefit;" language also found in the first constitutions of Virginia and Vermont.[2] So too Hamilton, in 1780, boldly outlined a plan for a more perfect union whose powers should be adequate to the public exigencies, organized for "the general good" and "the common sovereignty" and having power "sufficient to unite the different parts together and direct the common forces

[1] Franklin's plan, July 21, 1775, Articles II, V, VI; Carson, II, 500.

[2] Pennsylvania Constitution, 1776, Article V; Virginia Constitution, 1776, Bill of Rights, Section 3; Vermont Constitution, 1777, Article VI, 1786, Article VII.

to the interest and happiness of the whole."[1] The preamble of the Articles of Confederation declared their purpose to be "perpetual union;" and while the Articles were under discussion, Massachusetts adopted a constitution, whose preamble declares that "laws are for the common good," and that the new constitution was adopted "for ourselves and our posterity."[2] Four years later, New Hampshire, slightly varying the phraseology, declared in its constitution that "government is instituted for the general good."[3]

While the Virginia Plan was under discussion, and after the reports of the Committee of Detail and the Committee of Eleven had been made, Roger Sherman used the phrase "common defence and general welfare" as indicative of the purpose of the new government.[4] Thus Morris had at hand a collection of significant phrases of well adjudicated meaning, if time and long continued use be the test. It was easy to arrange them in their order. The phrase "ordain and establish" had long been in use in the enacting clause of British statutes.[5] The general grant of legislative powers characteristic of the State constitutions in force in 1787, and the unlimited authority of the British Parliament, were undoubtedly the precedent for the general grant of legislative powers to Congress. Vermont, New Hampshire, Massachusetts and South Carolina denominated their Lower House, the House of Representa-

[1] Hamilton to Duane, Vol. I, p. 244.

[2] See also Part 1, Article I, of the Constitution of Massachusetts of 1780; also Article VII.

[3] New Hampshire Constitution, 1784, Part 1, Article I.

[4] August 25; Elliot, p. 477.

[5] As in the Statute of Treason (25 Edw. III, 1, 5) 1352: Elliot, V, 449; also see the note on Morris, Supra.

tives,[1] and these States, together with New York, Maryland, Virginia and North Carolina, called their Upper House, the Senate.[2]

All the States, except Pennsylvania and Georgia, had the bi-cameral system,[3] and these two States adopted it in 1789. The Virginia Plan called for the general investiture of legislative power, but the distinctive titles, Senate and House of Representatives,[4] were suggested by the Committee of Detail. The separation of the powers of legislation had been discussed by Madison in his letter to Jefferson in March, before the Convention assembled, as a reform greatly needed. He had also advocated two branches of the legislature in his letter to Washington in April, a suggestion to which the Virginia Plan conformed. The custom of the country called for annual elections, South Carolina alone choosing the members of its Lower House biennially.[5] The Virginia Plan proposed that Representatives should be chosen by the people. Rutledge suggested "every two years," as also did Randolph.[6] But it was the Committee of Detail that suggested that the electors in each State should have the "qualifications requisite for the electors of the most numerous branch of the

[1] Vermont Constitution, 1777, Article II; 1786, Article II; South Carolina, 1778, Article II; Massachusetts, 1780, Part 2, Section 1, Article I, Chapter I, Section 3; New Hampshire 1784, Part 2, Article II; Maryland, 1776, Article I.

[2] Virginia, 1776, Section 4; North Carolina, 1776, Article I; New York, Article II, and South Carolina, Article II; Massachusetts, 1780, Part II, Section 1, Article I; Chapter I, Section 2; New Hampshire, 1784.

[3] Pennsylvania 1776-1789; Georgia 1777-1789.

[4] Article I, Section 1: 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

[5] South Carolina Constitution, 1778, Article XIII.

[6] Rutledge, June 12, Elliot, V, 223; Randolph, June 21; Ib. 224.

State legislature," and that they should be chosen every second year by the people of the several States.[1]

That the Representative should be twenty-five years of age was first proposed by Mason.[2] The age prescribed for Representatives by the State constitutions at this time, or by custom, was twenty-one years.[3] The additional qualification of United States citizenship, which was now required for the first time, seems to have originated with the Committee of Detail. Mason[4] proposed the seven years' citizenship, and Sherman that the Representative should be an inhabitant of the State in which he should be chosen. The nearest precedent for which, in the American practice, was the county residence required of representatives in Virginia.[5]

The apportionment of public expenses[6] according to population was prescribed in New England Articles of

[1] Section 2: 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

2. No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[2] June 22, Elliot, V, 228.

[3] For the qualification of representatives prescribed in State constitutions, 1776-1800, see the Constitutional History of the American People, 1776-1850, Vol. I, pp. 68-71.

[4] August 8, Elliot, V, 389.

[5] Virginia Constitution, 1776, Section 3.

[6] 3. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the

Union of 1643,[1] and Pennsylvania in its first constitution declared that the apportionment of Representatives according to the number of taxable inhabitants "is the only principle which can at all times secure liberty."[2] This principle had been laid down by Madison in his letters of March and April to Jefferson and Washington, and had been incorporated in the Virginia Plan. Gouverneur Morris, a citizen of Pennsylvania, first proposed in the Convention that taxation should be in proportion to representation,[3] and his suggestion was adopted and embodied in the report of the Committee of Detail. With him also originated the restriction of determining the number of Representatives according to the whole number of "free" citizens.[4] Randolph proposed a census,[5] for which only two States, New York and South Carolina, made any provision.[6]

The celebrated three-fifths clause was proposed by Wilson of Pennsylvania and Pinckney,[7] on the eleventh of

first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

1 Article IV, Carson, II, 441.

2 Pennsylvania, 1776, Section 17.

3 July 12, Elliot, V, 302.

4 August 8, Elliot, V, 392.

5 July 10, Elliot, V, 293.

6 New York, a septennial census, constitution 1777, Articles V, XII; census every fourteen years, South Carolina Constitution, 1778, XV. The Federal census, once in ten years, was a compromise.

7 Elliot, V, 181.

June,[1] and was incorporated by Paterson four days later, into the New Jersey Plan,[2] and yet later were incorporated the apportionment of representation and direct taxes among the States, and also the number of Representatives in the first Congress,[3] and the number in connection with representation in the Senate giving an average membership in Congress of seven to each State.[4] The clause empowering the executive authority of a State to issue writs of election to fill vacancies in its representation stands in the Constitution[5] almost word for word as it was reported by the Committee of Detail. The nearest approach to a precedent for it, in America, was the provision in the constitution of South Carolina, directing the President of its Senate and the Speaker of its House to issue writs for filling vacancies caused by death, in their respective Houses, during the recess.[6]

That the Lower House should choose its Speaker[7] conformed with the practice of the British government and was suggested by the Albany plan, of 1754,[8] by Galloway,

[1] For the early history of the three-fifths clause, see Vol. I, pp. 221-223, 355, ante.

[2] Elliot, V, 192. For the discussion of the clause as applicable to a State, see Debates of the Constitutional convention of Virginia, 1829-1830, p. 276 et seq.

[3] July 9, Elliot, V, 288; July 10, Id. p. 290, as in the Constitution.

[4] This conformed liberally to the suggestion of Franklin in the Albany plan, that each Colony should have no less than two or more than seven delegates.

[5] 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[6] South Carolina Constitution, 1778, XVIII.

[7] 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

[8] Carson, II, 469.

twenty years later;[1] it prevailed in the States,[2] and was the practice of the old Congress.[3] Equally abundant were the precedents for giving the House the sole power of impeachment, though the New York constitution declared that it should always be necessary for two-thirds of the members present to agree to the impeachment.[4] The language of the clause on the choice of the Speaker and the power of impeachment was the work of the Committee of Detail.

For the organization of the Senate, the oldest American precedent was the provision for "the two commissioners from each jurisdiction" in the New England Articles of 1643.[5] The Earl of Stair also proposed a similar arrangement for the Provinces in 1721.[6] Franklin and Hutchinson had suggested a Grand Council in 1754, composed of from two to seven members from each province.[7] The constitution of Virginia required the State Senator to be

1 Galloway's plan, 1774, Carson, II, 499.

2 New Jersey, 1776, Article V; Pennsylvania, 1776, Section 10; Delaware Constitution, 1776, Article V; Maryland, 1776, Article XXIV; North Carolina, 1776, Article X; South Carolina, 1776, Article IX; 1778, Article XVIII; New York, 1777, Article IX; Vermont, 1777, Article IX; 1786, Article XII; Massachusetts, 1780, Part 1, Chapter i, Section 3, Article X. It was the unwritten constitution in the other States.

3 Articles of Confederation, IX.

4 Pennsylvania, 1776, Section 22; Delaware, 1776, Article XXIII; Virginia, 1776, Section 15; Georgia, 1777, XLIX; South Carolina, 1778, XXIII; New York, 1777, Article XXXIII; Vermont, 1777, Article XX; 1786, Article XXI; Massachusetts, 1780, Part 1, Chapter i, Section 3, Article VI.

5 Article VI, Carson, II, 442.

6 A council of two members from each Province elected by the assembly. Plan of the Earl of Stair, 1721, Section 3, Carson, II, 460.

7 Carson, II, 469, 475.

a resident of his district,[1] and the principle of residence was strictly observed in the Articles of Confederation.[2] Gorham of Massachusetts proposed two Senators from each State;[3] and Spaight of North Carolina that the Senators should be chosen by the State legislatures,[4-5] a proposition which he almost immediately withdrew, but which was a few days afterward renewed by Dickinson of Delaware.[6] The term for six years was proposed by Williamson of North Carolina,[7] and also by Gorham and Wilson; that the Senators should "vote per capita" was proposed by Gouverneur Morris, but later more smoothly expressed by him, that "each Senator shall have one vote."[8] The Committee of Detail embodied these various suggestions[9] which

[1] Virginia, 1776, Section 4. The State was divided into 24 senatorial districts and each county was given two representatives; the districts were formed of groups of counties. A similar arrangement prevailed in Massachusetts, in the Constitution of 1780.

[2] Article V. Of course a delegate to Congress was a citizen of the State which elected him, although Delaware did not strictly keep the rule.

[3] July 23, Elliot, V, 356.

[4] May 31, Elliot, V, 137.

[5] Section 3: 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[6] June 7, Elliot, V, 166.

[7] June 25, Elliot, V, 241. By Gorham and Wilson, June 26.

[8] July 23, Elliot, V, 356.

[9] 2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year; so that one third may be chosen every second Year; and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

had been approved by the Convention and expressed them almost in the language of the Constitution.

In the frame of government for Pennsylvania which William Penn drew up in England in 1682, he provided for a provincial council, divided into three classes, an arrangement incorporated into the first constitution of Pennsylvania nearly a century later.[1] A division of the Upper House into classes was also provided for in the first constitutions of Delaware, Virginia, South Carolina and New York.[2] Doubtless it was the practice in South Carolina that suggested to Pinckney and Rutledge, of that State, on the eighth of June[3] to divide the Senate into three classes, and the idea was elaborated by the Committee of Detail, and reported as it stands in the Constitution. The age required of Senators, thirty years, was required in South Carolina and New Hampshire.[4] It was agreed to, by the Committee of the Whole, in June,[5-6] and, later, by the Committee of Detail. The longest period of residence which any State required of a Senator was seven years, in New Hampshire,[7] but inhabitancy, from

[1] See the Proprietary Frame, etc., for Pennsylvania, Article III, in the proceedings of the Conventions of 1776 and 1790, p. 20, and the adaptation of the Article in the Pennsylvania Constitution, 1776, p. 19; for the council of three classes, three, two, and one years, as in the Pennsylvania Frame.

[2] Delaware 1776, Article IV (Council, 3 classes); Virginia, 1776 (Senate 4 classes); New York 1777, Article XI (Senate 4 classes, 4 years); South Carolina, 1778, Article IX (Council, 2 classes).

[3] Elliot, V, 174.

[4] South Carolina constitution, 1778; New Hampshire constitution, 1784.

[5] June 18, Elliot, V, p. 189.

[6] 3. No Person shall be a Senator who shall not have attained to the Age of thirty years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[7] Constitution 1784.

one to five years, was required in all the States and, by implication, in the Articles of Confederation.[1] It was on Randolph's suggestion that citizenship of nine years was required of Senators.[2]

That the Vice-President should be President of the Senate, but have no vote unless it be equally divided, was a compromise measure from the Committee of Eleven.[3-4] In Pennsylvania and South Carolina the President presided over the council, and, in New York, the Lieutenant-Governor over the Senate.[5] That the Senate should choose its various officers was the practice in all the States that had an Upper House, though prescribed by the constitutions of only four.[6] The provision was inserted in the Constitution by the Committee of Detail.[7] The precedent for making the Senate a court to try all impeachments was laid down in the constitutions of four States.[8]

1 Article V. For the qualification of State senators, 1776-1800, see my Constitutional History of the American People, 1776-1850, Vol. I, pp. 77-80. The requirement of residence was not strictly followed by Delaware in choosing its delegates to Congress, 1776-1787.

2 August 9, Elliot, V, 400.

3 September 4, Elliot, V, 507.

4 4. The Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

5 Pennsylvania constitution, 1776, Sections 19 and 20; South Carolina 1776, Article V; New York, 1777, Article XX.

6 Maryland 1776, Article XXIV; South Carolina, 1776, Article IX; Massachusetts 1780, Part 1, Chapter I, Section 2, Article VII; New Hampshire, 1784.

7 5. The Senate shall chuse their other Officers, and also a President pro tempore in the Absence of the Vice-President, or when he shall exercise the Office of President of the United States.

8 Delaware, 1776, Article XXIII, by legislative council; New York, 1777, Article XXIII, by the Senate; Massachusetts, 1780, Part 1, Chapter I, Section 2, Article VIII; New Hampshire, 1784, by the Senate.

and by the practice of the British House of Lords. Gouverneur Morris suggested the provision that, when sitting as a court, the Senators should be on oath or affirmation, but the clause as a whole was the work of the Committee of Eleven.[1] That no person should be convicted without the concurrence of two-thirds of the members present may have been suggested from the constitution of New York, in which Morris, one of its authors, found his suggestion.[2] The clause declaring the extent of judgment in cases of impeachment[3] came from the Committee on Detail, but its language was taken almost verbally from the constitutions of Massachusetts and New Hampshire.[4] With this committee also originated the provision affecting the times, places and manner of holding elections for Senators and Representatives, and the power of Congress to regulate them by law.[5]

[1] 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[2] Gouverneur Morris removed from New York to Pennsylvania for a time. For his services in the convention which framed the New York constitution of 1777, see the Journal of the New York Provincial Congress, 1775-1777, Vol. I, and the Report of the Debates and Proceedings of the Convention of the State of New York, 1821 (L. H. Clarke). Appendix.

[3] 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall, nevertheless, be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

[4] Massachusetts Constitution, 1780, Part I, Chapter I, Section 2, Article VIII; New Hampshire, 1784.

[5] Section 4. 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Annual sessions of the legislature had prevailed in the country since the organization of its first legislative body in Virginia. Franklin in 1754 and Galloway, twenty years later, had suggested a grand council, whose session should be annual. The Congress of the Confederation assembled on the first Monday in November, in every year[1] and the State constitutions usually specified the time of the annual meeting of the legislature. That Congress should meet on the first Monday in December, unless by law it appointed a different day, was determined by the Committee of Detail.[2] The time of meeting coincided with that of the legislature of South Carolina by its first constitution.[3]

That each House should be the judge of the elections, returns and qualifications of its members was suggested by Pinckney;[4] and that the majority should constitute a quorum was taken from the constitution of Vermont by the Committee of Detail.[5-6] That a smaller number

[1] Article IV.

[2] 2. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

[3] South Carolina, 1776, Article XI, First Monday in December; New Jersey, 1776, Article III, second Tuesday in October; Maryland, 1776, Article XXIII, first Monday in November; Pennsylvania, 1776, Section 9, fourth Monday in October; Delaware, 1776, Article II, annual; North Carolina, 1776, Articles II, III, annual; New York, 1777, Article II, annual; South Carolina, 1778, Article XIII, first Monday in January; Vermont, 1777, Article VIII; 1786, Article IX, second Tuesday in October; Georgia, 1777, Article II, first Tuesday in January; Massachusetts, 1780, Part I, Chapter I, Section 1, Article I, last Wednesday in May; New Hampshire, 1784, first Wednesday in June.

[4] August 20, Elliot, V, 445.

[5] The Vermont Constitution of 1777, Article IX, defined a quorum of the House as two-thirds of all its members, but the Constitution of 1786 made the majority a quorum.

[6] Section 5. 1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business: but

may adjourn from day to day and compel the attendance of absent members emanated from Randolph and Madison.[1] The provision as a whole found a precedent in the constitutions of seven States.[2] That each House should determine the rules of its proceedings, punish its members for disorderly behavior and, if need be, expel a member, had long been the practice of the British Parliament, and was particularly provided for in four of the State constitutions.[3] That the expulsion of a member should be with the concurrence of two-thirds was proposed by Madison,[4] but the provision as a whole came from the Committee of Detail.[5]

Though legislative bodies in modern times have usually kept a journal, the requirement was not common to the early State constitutions. Delaware and New York alone made the provision explicit for both Houses,[6] and three other States made the requirement of the council.[7] The Articles of Confederation had introduced an innovation in legislative proceedings by requiring the periodical pub-

a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, etc.

[1] August 10, Elliot, V, 406.

[2] New Jersey, 1776, Article V; Delaware, 1776, Article V; Maryland, 1776, Article IX; North Carolina, 1776, Article X; New York, 1777, Article IX; Massachusetts, 1780, Part I, Chapter I, Section 2, Article IV (Senate), Section 3, Article X (House); New Hampshire, 1784.

[3] Delaware, 1776, Article V; Maryland, 1776, Articles X, XXI, XXIV; Massachusetts, 1780, Part I, Chapter 2, Section 3, Articles X and XI; New Hampshire, 1784.

[4] August 10, Elliot, V, 407.

[5] 2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[6] Delaware, 1776, Article 7; New York, 1777, Article XV.

[7] North Carolina, 1776, Article XIV; Pennsylvania, 1776, Section 20; Vermont, 1777, Article XVIII, 1786, Article XI.

lication of the journal, excepting parts which required secrecy.[1] Publication was not required by any of the State constitutions. Vermont provided that the entry of the vote on the journal should be made if required by one-third of the members present,[2] and the Articles of Confederation, that the yeas and nays must be entered at the request of any delegate.[3] The old Congress kept a secret journal, now long since published. The whole period of the American Revolution was one of publicity of legislative proceedings, and there was little that was said or done in the State legislatures or in Congress that was not soon well known among the people. Gleaning from the practice of the States, from that of Congress and the British Parliament, the Committee of Detail easily made up the familiar clause on the journal, the secrecy of legislative proceedings and the entry of votes when required by one-fifth of the members present.[4]

South Carolina forbade either House to adjourn for more than three days without the consent of the other, doubtless the origin of the similar provision in the Constitution.[5] New York limited the time to two days.[6] The Congress of the Confederation could adjourn to any time, within the year, but not for a longer period than six months, and to places within the United States.[7] The Committee of Detail doubtless utilized the precedent when

1 Publication monthly, Article IX.

2 Vermont, 1777, Article XIII; 1786, Article XIV.

3 Article of Confederation, IX.

4 3. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

5 South Carolina, 1778, Article XVII.

6 Constitution 1777, Article XIV.

7 Article IX.

it originated the clause on the subject in the Constitution.[1] A great innovation was instituted, in providing that members of the legislature should be paid for their services; indeed, the declaration was the first of its kind by any government in history.[2] The suggestion came from Pierce of Georgia.[3-4] The members of the grand council for the colonies, proposed by Lord Stair, in 1721, and, thirty years later, by Franklin and Hutchinson, were to receive compensation, but the proposition was only a scheme on paper.[5] Members of Parliament, of the State legislatures and of the Congress of the Confederacy were entitled to the privilege of freedom from arrest while in attendance, and the incorporation of the provision, which was taken almost verbally from the Articles of Confederation, was the suggestion of Pinckney.[6]

Perhaps the most important feature of his suggestion of compensation was its source,—the national treasury,—as, under the Articles, each State had maintained its delegates at its own expense. Taking freely from these prece-

1 4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

2 Baldwin's Modern Political Institutions (1898), p. 326.

3 June 12, Elliot, p. 185.

4 Section 6: 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

5 By the Albany plan a member was to receive ten shillings a day and mileage.

6 Article V of the Articles of Confederation. Massachusetts Constitution of 1780, Part 1, Chapter I, Section 3, Articles X, XI, Pinckney's suggestion, August 20; Elliot, p. 445.

dents, the Committee of Detail worked out the provision. By the Articles, no member of Congress could accept a salaried office under the United States,[1] and four of the States explicitly defined incompatible offices, though chiefly within the State.[2] Williamson of North Carolina and King of Massachusetts practically fixed the language of the provision on the subject in the Constitution[3] when they suggested it,[4] though it was modified by the Committee of Detail, and also by the Committee of Eleven.[5] The legislative practice of the country gave the Lower House of assembly the exclusive right to originate money-bills, following the precedent of Parliament. Six of the State constitutions contained a corresponding provision,[6] and it was in the unwritten constitutions of other States. Delaware and South Carolina empowered the Upper House to propose amendments, after the British model.[7] That the Senate should be restrained from originating money-bills was proposed by Gerry of Massachusetts,[8] and that

1 Articles of Confederation, V.

2 Maryland, 1776, Article XXXVII and XLIV; South Carolina, 1778, Articles XX, XXI; Massachusetts, 1780, Part II, Chapter VI, Article II; New Hampshire, 1784.

3 September 3.

4 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

5 Williamson and King moved the report of the Committee of Eleven, September 1; Elliot, V, 503.

6 Delaware, 1776, Article VI; Maryland, 1776, Articles X, XI, XXII; Virginia, 1776, Section 6; South Carolina, Article VII and 1778, Article XVI; Massachusetts, 1780, Part 1, Chapter I, Section 3, Article VII; New Hampshire, 1784.

7 Delaware, 1776, Article VI; South Carolina, 1776, Article VII.

8 June 13, Elliot, V, 188.

bills for raising revenue should originate in the House, by Strong of that State,[1] but the language of the whole clause was taken from the constitution of Massachusetts.[2]

The participation of the Executive in the work of legislation[3] was not common in the States though provided for in the constitutions of three and conforming to the earlier practice of English Kings; South Carolina, alone of the thirteen, gave the executive the veto power, and that by its first constitution;[4] New York and Massachusetts required that every bill should be submitted to him for approval.[5] Distrust of executive usurpation was a characteristic of the American constitutions and laws of the eighteenth

1 August 15, Elliot, V, 427a.

2 Section 7: 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

3 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

4 1776, Article VII.

5 New York, 1777, Article III. Bills sent to the Council of Revision consisting of the Governor, the Chancellor and the Justices of the Supreme Court or any two of them. Massachusetts, 1780, Part 1, Chapter 1, Section 1, Article II.

century. The assent of the president-general to acts of the proposed grand council in the Albany plan[1] seems to be the earliest suggestion in America of the participation of the executive in legislation. Gerry first proposed the overrule of the veto, an arrangement which both Wilson and Hamilton approved, though Hamilton mentioned at the time "that the King of Great Britain had not exerted his negative since the Revolution of 1689." That the veto might be overruled by two-thirds vote was agreed to by common consent.

The return of a bill within ten days was doubtless suggested from the constitution of Massachusetts, which required the governor to return it within five, or it should become a law without his signature. The Committee of Detail worked the precedent into the form in which the provision in the Constitution stands. From Massachusetts also came the provision that every concurrent resolution order or vote should be presented to the President;[2] but the suggestion of adopting the idea originated with Randolph of Virginia.[3-4]

The powers of Congress,[5] which evoked so long and

[1] 1754.

[2] Massachusetts, 1780, Part 1, Chapter 1, Section 1, Article II.

[3] August 16; Elliot, V, 431.

[4] 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment), shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

[5] SECTION 8.

1. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. To borrow Money on the credit of the United States;

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

4. To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

5. To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

7. To establish Post-Offices and post Roads;

8. To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

9. To constitute Tribunals inferior to the supreme Court;

10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

13. To provide and maintain a Navy;

14. To make Rules for the Government and Regulation of the land and naval Forces;

15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

16. To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

eager a debate in the Convention, were undoubtedly determined by the necessities of a National Government. That Congress should have power to lay and collect taxes, to pay the debts and to provide for the defence and common welfare of the United States, was suggested by Charles Pinckney of South Carolina;[1] but that all duties should be uniform was first urged by McHenry of Maryland and General Pinckney.[2] The Articles of Confederation had empowered Congress to borrow money and to regulate commerce with the Indian tribes; but Madison suggested that the power should extend to the regulation of commerce among the several States. He had made the same suggestion in his letter to Jefferson in the preceding March. That the rules of naturalization and the laws on the subject of bankruptcy should be uniform was proposed by Pinckney,[3] though the idea was in the New Jersey Plan. The language of the old Articles giving Congress authority to coin money, to regulate its value and to fix the standard of weights and measures[4] was repeated in the Constitution.

The provision for punishment for counterfeiting the securities and current coin of the United States originated with the Committee of Detail, though the inclusion of "securities" was the work of Gouverneur Morris. Lord Stair, in 1721, had proposed the establishment of a postal service once a week through the provinces, and, under the Articles of Confederation, the Department of the Post-Office had been established. The suggestion of "post

[1] August 18; Elliot, V, 440. Committee of Eleven, September 4; p. 506.

[2] August 25; Elliot, V, 479.

[3] August 25; Elliot, V, 488. Parliament established a uniform law of naturalization. Hildreth, II, 517.

[4] Parliament had passed several acts to regulate colonial currency.

roads" was Gerry's.[1] Both Madison and Pinckney[2] suggested the encouragement of science and the protection of authors and inventors,—ideas incorporated by the Committees of Eleven and of Detail. Admiralty Courts were established by the Articles of Confederation, whose provision on the subject was in part the precedent for constituting tribunals inferior to the Supreme Court. Ellsworth of Connecticut suggested punishment of piracies and felonies committed on the high seas and offenses against the law of nations; and Madison and Randolph[3] the power of Congress "to define them." To declare war and to grant letters of marque and reprisal were authorized by the Articles, but the particular provision on the subject in the Constitution was chiefly the work of Gerry, Pinckney and the Committee of Eleven.[4]

The Articles of Confederation also provided for making requisitions for troops. Gorham suggested that Congress should have power to raise and support armies, but Pinckney[5] was the author of the limitation that no appropriation of money to that use should be for a longer term than one year, but the time was modified to two years by the Committee of Eleven. The clause to provide and maintain a navy was taken from the Articles. Gouverneur Morris[6] was the author of the clause empowering Congress to provide "for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion."

[1] August 16; Elliot, V, 434. An act of Parliament regulated the post office system in the Colonies and fixed postal rates.

[2] August 18; Elliot, V, 440.

[3] August 17; Elliot, V, 437.

[4] August 17; Elliot, p. 439; August 18, Elliot, p. 440. September 5; Elliot, p. 510. The power to declare war was proposed in the fifth article of Franklin's plan of 1775.

[5] August 20; Elliot, V, 445. September 5; Id., p. 510.

[6] August 23; Elliot, V, 467.

That Congress shall have power for organizing, arming and disciplining the militia was suggested by Ellsworth,[1] but that this authority should govern such a portion of them as might be employed in the service of the United States was a condition fixed by Dayton of New Jersey.[2] The reservation to the States of the appointment of the officers was a survival from the Articles of Confederation.[3] That the militia should be trained according to a discipline prescribed by Congress was suggested by Madison.[4] He also proposed the exclusive control of the Federal District by Congress, in which idea he was suppported by Pinckney;[5] but the clause, as it stands, was chiefly the work of the Committee of Eleven. In his letter to Washington, of the preceding March, Madison had urged the principle embodied in Bedford's[6] motion of the seventeenth of July, and now known as the "sweeping clause" of the Constitution.[7]

It was due to General Pinckney of South Carolina that the Constitution permitted the importation of slaves,[8] but the limit of time, 1808, was proposed by Dickinson.[9-10] The principle of the *habeas corpus* act was a part of the

1 August 18; Elliot, V, 443.

2 August 23; Id., 465.

3 Articles VII and IX which declared the general powers of Congress referred to above.

4 August 23; Elliot, V, 466.

5 August 18; Id., 439.

6 July 17; Id., 220.

7 Art. I, Sec. 8, Cl. 18.

8 August 20; Id., 445.

9 August 25; Id., 477.

10 SECTION 9.

1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

constitutions of Georgia, Massachusetts and New Hampshire,[1] but the provision respecting the suspension of the writ was the work of Gouverneur Morris.[2-3] Bills of attainder and *ex post facto* laws were forbidden specifically by the constitutions of four States and practically by all the others.[4] Gerry and McHenry,[5] who were from States whose constitutions forbade such laws, proposed the clause on the subject in the Constitution.[6] The Committee of Detail was the author of the provision requiring the apportionment of direct taxes to the census and also of the

1 Georgia, 1777, Article LX; Massachusetts, 1780, Part 2, Chapter VI, Article VII; New Hampshire, 1784.

2 August 28; Elliot, V, 484; see also Pinckney, Ib.

3 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

4 North Carolina 1776, Article XXIV; Maryland, 1777, Article XV; Massachusetts, 1780, Part 1, Article XXIV; New Hampshire, 1784, Part 1, Article XXIII.

5 August 22, Elliot, p. 462; see also Rutledge, August 28, p. 485.

6 3. No Bill of Attainder, or ex post facto Law shall be passed.

4. No Capitation or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

5. No Tax or Duty shall be laid on Articles exported from any State.

6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties, in another.

7. No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

injunction on laying taxes on exports from any State. To Carroll and Luther Martin[1] we owe the clause forbidding discriminations in post regulations, and to Sherman[2] the clauses forbidding the withdrawal of money from the treasury, except by lawful appropriations, and calling for the regular publication of the receipts and expenditures of public money. The clause on titles of nobility and the acceptance of gifts, offices and titles from foreign powers was proposed by the Committee of Detail, though the germ of it was found in the Articles of Confederation.[3]

That the powers of the State should be limited and especially as to bills of credit had been earnestly urged by Madison in his letters to Jefferson and Washington just before the Convention met, and the Articles of Confederation put several limitations on the States, all of which were incorporated in the Constitution.[4] Wilson and Sherman were the immediate authors of the clause forbidding a State to "make anything but gold and silver coin a tender in payment of debts;"[5] and Pinckney, of the provision forbidding the States to keep troops, or ships of war, in time of peace.[6] The remaining provision limiting the States was the work of the Committee of Detail.[7]

1 August 25, Id., p. 479.
2 August 28, Id., p. 484.
3 Article VI.
4 Articles of Confederation VI.
5 August 28, Elliot, V, 484.
6 August 20, Elliot, V, 445.
7 Section 10: 1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any title of Nobility.

2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the

The title "President," for the Chief Executive, was given by the Virginia charters of 1606, 1609 and 1611, to the presiding officer in the meetings of the directors of the London and Plymouth companies, and doubtless the word soon found its way into the colony. The title was used in the charter of New England, of 1620; in the grant of New Hampshire to John Mason, in 1629; in the New England Union, of 1643; thirty-six years later in the New Hampshire commission, and in the last colonial charter, that of Georgia of 1732.[1] At the time of the Revolution, the term was taken up as a proper title for the chief executive, and was used in the constitutions of five States.[2] The title was also given to the presiding officer of Congress.[3] Franklin, the President of Pennsylvania, was a member of the Federal Convention. It was the Committee of Detail that gave the title to the Chief Executive of the United States.[4] Wilson suggested that the executive

net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War, in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or Engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

1 These Charters may be found in Poor's Charters and Constitutions.

2 Pennsylvania 1776, Sections I and III. South Carolina, 1776, Article III; Delaware, 1776, Article VII; New Jersey, 1776, Article VI; the governor was president of the council; New Hampshire 1784.

3 1776-1789; explicitly by the Articles of Confederation IX.

4 Article II. Section 1: 1. The Executive Power shall be vested in a President of the United States of America. He shall hold his office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected as

power be vested in one person,[1] and he also suggested the choice by special electors.[2] The four years' term was fixed by the Committee of Eleven.[3] The exclusion of Senators,

follows: *The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such a Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse, by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List, the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

4. The Congress may determine the Time of chusing the Electors; and the day on which they shall give their Votes; which Day shall be the same throughout the United States.

5. No Person except a natural-born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[1] June 1, Elliot, V, 140; see also Rutledge and Pinckney, June 2, p. 149.

[2] June 2, Id. p. 143; see also Madison, July 19; Elliot Id. 337, and Ellsworth, Id. p. 338.

[3] September 4, Elliot, Id. 507.

*See Amendment XII.

Representatives and United States officials from an appointment as an elector[1] was suggested by King and Gerry.[2] The nearest approach to a precedent for the electors was the manner of choosing State Senators in Maryland.[3] The term "appointed" as applying to the electors, was suggested by Mason.[4] Sherman proposed the election of the President by the House of Representatives in certain cases.[5] The governors of the States, at the time when the national Constitution was made, were usually native-born Americans, and as required by most of the constitutions, at least thirty years of age.[6] The qualifications of citizenship, age, and residence, were the work of the Committee of Detail and the Committee of Eleven, though the required age of thirty-five years was proposed by Rutledge.[7] In no important particular did the Constitution depart from the State instruments so widely as in its provision for the election of the President. The New England States and New York chose their chief executive by popular vote, but the remaining States by joint ballot of the two Houses.

1 2. Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

2 September 6, Elliot, V, 515.

3 Maryland, 1776, Articles XIV and XVIII.

4 September 5; Elliot, V, 515.

5 September 6; Id. p. 519.

6 For the qualifications of governors, 1776 to 1800, see the Constitutional History of the American People, 1776-1850, Vol. I, pp. 82-83.

7 August 20, Elliot, V, 462.

The Committee of Eleven originated the clause providing for the succession in case of the removal of the President or Vice-President; and the Committee of Detail, the clause on the President's compensation and his power to fill vacancies.[1] This committee also formulated the oath, though its language was mostly taken from the constitutions of New York and Vermont. Its concluding phrase was suggested by Mason and Madison. That the President should be commander-in-chief of the army and navy of the United States and of the militia, originated with Sherman, but it had been suggested by Madison in his letter to Washington and was a part of Hamilton's plan. Madison and Butler proposed the phrase giving the President power to require the opinions of the heads of departments, though the language in which the entire subject was finally clothed must be attributed to the Committee of Eleven.[2] The

1 6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be Increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period, any other Emolument from the United States, or any of them.

8. Before he enter on the Execution of his Office he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

2 Section 2: 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject

President's participation, with the Senate, in the treaty-making power, was taken from Hamilton's plan, though Rutledge and Gerry suggested the requirement that two-thirds of the Senators present concur in a treaty.[1] The power of the President to fill offices, and to appoint ambassadors, other public ministers and judges, was first proposed by Madison,[2] and later by Gorham, Gouverneur Morris and Dickinson. The power of the President to fill

relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers, and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of the next Session.

1. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers, he shall take Care that the Laws be faithfully executed, and shall commission all the Officers of the United States.

Section 4: 1. The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

[1] September 8, Elliot, V, 527.

[2] Madison, June 1, Elliot, V, 141; Gorham, July 18, Id. p. 328; Morris, Id. p. 330; Dickinson, August 24, Id. p. 474.

vacancies during the recess of the Senate was suggested by Spaight;[1] and his pardoning power, by the Committee of Detail.

Most of these immediate suggestions for the Executive, it will be noticed, were well founded in American precedents. As far back as the Albany plan it had been proposed to give the president-general the power to make treaties with the Indians, to regulate trade, and to declare peace or war with them, with the advice of the grand council.[2] So, too, the Speaker of this grand council was to succeed the president-general in case of his death, resignation or removal, but the chief precedents for the provisions now adopted were to be found in the State constitutions. The lieutenant governor might succeed the governor in New York, Massachusetts and South Carolina,[3] and the Vice-President, the chief executive in Delaware and New Jersey.[4] The oldest in commission in the council succeeded him in Maryland.[5] The Speaker of the Senate or of the House, in North Carolina and the senior senator, in New Hampshire.[6] Five of the State constitutions made particular provision for the compensation of the chief executive.[7] The governor of New York took oath that he would take care that the laws be faithfully executed to the best of his

1 September 7, Elliot, V, 524.

2 Similar provisions were proposed in the Hutchinson plan; see Carson, II, 476-477.

3 New York, 1777, Article XX; Massachusetts, 1780, Part 1, Chapter II, Section 2, Article III; South Carolina, 1778, Article VIII.

4 Delaware, 1776, Article VII; New Jersey, 1776, Article VII.

5 Maryland, 1776, Article XXXII; North Carolina, 1776, Article XIX.

6 New Hampshire, 1784.

7 Virginia, 1776, Section 7; North Carolina, 1776, Article XXI; South Carolina, 1776, Article XXXIV; 1778, Article XXXVII; Massachusetts, 1780, Part I, Chapter II, Section 1, Article XIII; New Hampshire, 1784.

ability,[1] and a like solemn promise was required of the executive of other States.[2] In the eighteenth century, and especially before the adoption of the national Constitution, the governor of a State was considered by the people to be chiefly a military officer, and the State constitutions uniformly styled him commander-in-chief of the army and navy.[3] The Albany plan had proposed to empower the president-general to nominate officers in the army and navy, their commissions to come from the Crown. This power, in the States, was commonly placed with the legislature. The power of the executive to pardon was limited in most of the States, though granted without restriction in three.[4] His power to fill vacancies was chiefly limited to the militia, but it was specified, at length, in the constitutions of seven States.[5] The constitutions of Georgia and New York established a precedent for the governor's message.[6] Six of the States empowered the executive to

[1] New York, 1777, Article XIX; see also Vermont, 1777, Article XVIII, and 1786, Article II.

[2] Pennsylvania, 1776, Section 40; Delaware, 1776, Article XXII; Maryland, 1776, Article L; Georgia, 1777, Article XXIV; South Carolina, 1776, Article XXXIII, and 1778, Article XXXVI; Massachusetts, 1780, Part 1, Chapter VI, Article I; New Hampshire, 1784.

[3] For the account of the organization of the State governments in the eighteenth century, see Chapters ii, iii, and iv of Vol. I of the Constitutional History of the American People, 1776-1850.

[4] Maryland, 1776, Article XXXIII; Vermont, 1777, Article XVIII; New Hampshire, 1784, with the advice of council. It was granted conditionally in Virginia, 1776, Section 7, and in North Carolina, 1776, Article XIX. It was limited in Delaware, 1776, Article VII, in New York, 1777, Article XVII, and was denied in Georgia, 1777, Article XIX.

[5] Pennsylvania, 1776, Section 20; Virginia, 1776, Section 14; North Carolina, 1776, Article XX; South Carolina, 1776, Article XXIV and XXX, and 1778, Articles XXXI-XXXII; Georgia, 1777, Article XXII; Vermont, 1777, Article XVIII; New Hampshire, 1784.

[6] Georgia, 1777, Article XXII; New York, 1777, Article XIX.

call extra sessions of the legislature,[1] but the power to adjourn it was usually denied him.[2] While it cannot be said that the chief executive of any one State was a prototype of the President, it is clear that, in the aggregate, the State executives possessed, though in a limited way, the powers which the national Constitution now gives to the President.

Thus he was required to give Congress information, from time to time, of the state of the Union; and he was empowered to convene both Houses, or either of them, on extraordinary occasions, the suggestion emanating from McHenry.[3] He should take care that the laws be faithfully executed, an obligation suggested by Madison.[4] That the President should be impeachable was suggested by Williamson,[5] and the proposition found a precedent in the constitutions of four States.[6] His right to commission officers of the United States may have been suggested from the constitution of Vermont.[7]

In establishing the Department of the Judiciary,[8] the

[1] Delaware, 1776, Article X; Virginia, 1776, Section 8; South Carolina, 1776, Article VIII; Georgia, 1777, Article XX; New York, 1777, Article XVIII; New Hampshire, 1784.

[2] As in Delaware, 1776, Article X; Virginia, 1776, Section 8, but permitted in New York, 1777, Article XVIII (to prorogue sixty days); New Hampshire, 1784.

[3] September 8, Elliot, v. 530.

[4] June 1, Id. p. 141.

[5] June 2, Id. p. 149.

[6] Virginia, 1776, Section 15; Delaware, 1776, Article XXIII; Georgia, 1777, Article XLIX; Vermont, 1777, Article XX; 1786, Article XXI. Judges were declared impeachable in Virginia, 1776, Section 16; Vermont, 1777, Article XX; and 1786, Article XXI.

[7] Vermont, 1777, Article XVIII; 1786, Article XI.

[8] Article III: Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated

Convention, as has been already said, had only the necessities of the proposed government for their guide. The term "judicial power," as descriptive of the department, originated with Madison and Gouverneur Morris,[1] but the Virginia Plan contained the provision for one Supreme Court, and such inferior courts as Congress might establish. Both the New Jersey and Virginia Plans made the tenure of judicial office for good behavior, and also provided that the judges should receive a compensation for their services, which should not be diminished during their continuance in office. In his letter to Washington, in April, Madison had suggested a supreme national judiciary, and the Virginia Plan made a general, unlimited grant of judicial powers. In his letter to Jefferson, in

Times, receive for their Sevices a Compensation, which shall not be diminished during their Continuance in Office.

Section 2: 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

[1] August 27, Elliot, V, 483.

March, he had urged, as one of the reforms most necessary, the practical separation of the powers of government. The phraseology of the clause respecting the jurisdiction of the judicial power was largely the work of the Committee of Detail, but Rutledge suggested the phrase which gives jurisdiction over controversies to which the United States is a party.[1] Pinckney suggested that respecting controversies between a State and citizens of another, and between citizens of different States,[2] and Sherman proposed that respecting controversies between citizens of the same State claiming lands under grants of different States,[3] though the idea was already embodied in the Articles of Confederation.[4] We are indebted to the Committee of Detail for the provisions respecting the trial of all crimes by jury; for extending the original jurisdiction of the judicial power to cases affecting ambassadors, other public ministers and consuls, and those to which a State is party; and also respecting the appellate jurisdiction. But the Virginia Plan proposed a maritime jurisdiction and jurisdiction over cases to which citizens of foreign States might be a party. The provision on treason[5] is a clear case of transfer from the British Statute of Treasons of Edward III,[6] though Franklin added the requirement of the testi-

[1] August 22, Elliot, V, 462.

[2] Pinckney, August 20, Elliot, V, 446.

[3] August 27, Elliot, V, 483.

[4] Article IX.

[5] Section 3: 1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

[6] 25 Edward III, A. D. 1352.

mony of two witnesses[1] and Luther Martin, that the confession should be in open court,[2] but Mason completed the definition of treason by adding to the words "adhering to their enemies," the phrase "Giving them aid and comfort." As a whole, the article on the Judiciary was put into form by the Committee of Detail, for Morris is our authority, that it was left quite as it came to him from that committee.

That full faith should be given in each State to the public acts and judicial proceedings of every other State, taken from the Articles of Confederation, may have been suggested by Gouverneur Morris,[3] but the language, as it stands, was chiefly from Rutledge,[4] of the Committee of Detail,[5] though later slightly modified by Madison.[6] Rutledge's committee also proposed the clause, taken from the Articles, on equal privileges and immunities to citizens in

1 August 20, Elliot, V, 449.

2 August 20, Id., 451.

3 August 29, Elliot, V, 488; Articles of Confederation IV and XII.

4 September 1st, Id. V, 504.

5 Article IV: Section 1. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2. 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

3. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

6 September 3, Id., 504.

the several States, and also that for the delivery of fugitives from justice. It was a clause of old standing, having been in force forty years under the New England Union of 1643, and it was proposed in the New Jersey Plan, that fugitive slaves should be delivered up on claim of the party to whom their labor might be due, was suggested by Butler and Pinckney.[1] The Committee of Detail followed the Virginia and New Jersey Plans in providing for the admission of new States. The Articles provided for the admission of Canada, but Franklin's plan, of 1775, had provided for the admission of all the English colonies in America and for Ireland.[2] The State immediately in the mind of the Convention was Vermont.[3] The clause on the admission of States and the subdivision of old ones stands substantially as proposed by Gouverneur Morris,[4] though slightly modified by Dickinson.[5] Morris also was the father of the provision[6] giving Congress power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.[7] The idea of granting a republican form of government to every

1 August 28, Id. p. 487; and by Butler, August 29, Id. p. 492.

2 Article XII.

3 Elliot, vol. V, 495.

4 August 29, Elliot, V, 493; August 30, Id. p. 496.

5 Ib.

6 Section 3: 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

7 August 30, Elliot, V, 497.

State originated with Madison and Randolph, but the language of the clause[1] in which it occurs was James Wilson's.[2] The Virginia Plan provided for amendments, Madison first[3] suggesting the incorporation of the idea, but the Committee of Detail reported the article substantially as it stands.[4]

The clause declaring the debts of the Confederation valid[5] was proposed by Randolph,[6] though after a sugges-

[1] Section 4: 1. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[2] Madison had enlarged on this reform in his letter to Washington, of April 16, and it was in the Virginia plan. July 18, Elliot, V, 332-333.

[3] September 10, Elliot, V, 531.

[4] Article V: 1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

[5] Article VI: 1. All debts contracted and Engagements entered into before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

tion to the same end by Morris.[1] That the Constitution and the laws of the United States and all treaties made under its authority shall be the supreme law of the land, was taken immediately from Hamilton's Sketch, though found, in part, in the New Jersey Plan. In his letter to Washington, in April, Madison had urged that the judges in every State ought to be bound to support the national Constitution, and the idea was incorporated in the Virginia Plan; but in this plan the oath was also to be taken by State legislators and executives, a provision, which though not incorporated in the Constitution, has become part of the practice of the country and especially by State law. The entire clause, as it stands, coincides closely with Luther Martin's resolution of the seventeenth of July, but is expressed almost in the original language of Rutledge.[2] We owe it to Pinckney that no religious test can ever be required as a qualification to any office of public trust under the Constitution.[3]

Madison had also expressed to Washington, in his letter of April, the necessity of a ratification of the Constitution by the people, and not merely by "the ordinary authority of the legislatures." The Committee of Detail

3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

6 August 25, Elliot, Id., 476.

1 August 22, Elliot, Id., 464.

2 August 23, Elliot, Id., 467; see also Articles of Confederation, XIII.

3 August 30, Elliot, p. 498. Disapproval of religious tests was expressed in the form of an amendment proposed by South Carolina at the time of ratifying the Constitution. Elliot, Vol. IV, 319.

reported the article on the subject, but that the ratification by nine States[1] should be sufficient for establishing the Constitution was suggested by Randolph.[2]

[1] Article VII: 1. The Ratification of the Convention of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Done in Convention by the Unanimous Consent of the * States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names.

Go: WASHINGTON—Presidt. and deputy from Virginia.

Attest William Jackson Secretary.

New Hampshire: John Langdon, Nicholas Gilman.

Massachusetts: Nathaniel Gorham, Rufus King.

Connecticut: Wm. Saml. Johnson, Roger Sherman.

New York: Alexander Hamilton.

New Jersey: Wil: Livingston, David Brearley, Wm. Paterson, Jona: Dayton.

Pennsylvania: B. Franklin, Thomas Mifflin, Robt. Morris, Geo. Clymer, Thos. Fitz Simons, Jared Ingersoll, James Wilson, Gouv Morris.

Delaware: Geo: Read, Gunning Bedford jun, John Dickinson, Richard Bassett, Jaco: Broom.

Maryland: James McHenry, Dan of St. Thos. Jenifer, Danl Carroll.

Virginia: John Blair, James Madison Jr.

North Carolina: Wm: Blount, Richd. Dobbs Spaight, Hu Williamson.

South Carolina: J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.

Georgia: William Few, Abr Baldwin.

[2] August 30, Elliot, pp. 493-501.

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*The word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

[Note by Department of State: The interlined and rewritten words mentioned in the above explanation, are in this edition, printed in their proper places in the text.]

The origin of the fifteen articles commonly called the Amendments having been shown at length in the chapters which treat of them, it is unnecessary to give more than a brief and general account of their sources. Without exception the first ten emanated from the ratifying conventions of 1788, and were transcripts of provisions in the various Bills of Rights in force in the country. These ten articles were not amendatory of the Constitution, but were proposed in addition to its original seven articles, and their relationship to the original instrument must not be confused with that which the last five amendments bear. The first draft of these amendments[1] was pro-

[1] [Articles in Addition to and Amendment of the Constitution of the United States of America, Proposed by Congress and Ratified by the Legislatures of the several States, Pursuant to the Fifth Article of the Constitution.]

(ARTICLE I.)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(ARTICLE II.)

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(ARTICLE III.)

No soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor, in time of war, but in a manner to be prescribed by law.

(ARTICLE IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(ARTICLE V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

posed by Madison on the eighth of June, 1789, and it was his intention that the proposed new matter should be inserted here and there in its proper place in the original Constitution.[1] This new matter was handed over to a Committee of Eleven, five of whose members, including Madison, had belonged to the Federal Convention, and

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(ARTICLE VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defence.

(ARTICLE VII.)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(ARTICLE VIII.)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(ARTICLE IX.)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(ARTICLE X.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[1] For the draft as proposed by Madison see pp. 199-211, Vol. II.

this committee reported on the thirteenth of August. The language of its report conformed closely with that of the amendment as finally adopted.[1] Fisher Ames suggested much of the language of the First Article, especially that respecting an established religion; Elbridge Gerry, that of the Fourth, securing the people against unreasonable searches and seizures; and Daniel Carroll and Roger Sherman the language of the Tenth Article, respecting the powers which "are reserved to the States respectively, or to the people."[2] The final arrangement of the articles and the language in which they are expressed were the work of the Special Committee appointed by the House on the twenty-fourth of August, consisting of Benson, Sherman and Sedgwick, whose draft of the amendment, the fourth that had been made, went to the Senate and passed Congress on the twenty-fifth of September.[3]

The first amendment of the original Constitution was the Eleventh Article, on the judicial power,[4] and was intended to interpret the meaning of that portion of the original article respecting the jurisdiction of the judicial power of the United States "in cases between a State and citizens of another State,"[5] and between it and foreign citizens or subjects. Henceforth, the judiciary power of the United States should not be construed "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by

[1] See the second draft of the amendments as finally adopted, Vol. II, pp. 225-227.

[2] See Vol. I, p. 249.

[3] For the two articles of this draft which were not ratified by the requisite number of States see Vol. I, p. 257.

[4] Article XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[5] Article III, Section 2.

citizens or subjects of any foreign State." Stripped of technical language this means that an American Commonwealth cannot be sued in any court of the United States by a citizen of another State, or of any foreign country. The language of the Eleventh Amendment was largely the work of Albert Gallatin.[1]

The Twelfth Article[2] was an amendment of the original instrument, and changed the manner of electing the Presi-

[1] See Vol. II, pp. 290, 292.

[2] Article XII: Section 1. The Electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose

dent and Vice-President.[1] With the amendment are associated the names of five Representatives, and DeWitt Clinton, a Senator from the State of New York,—who at times had submitted resolutions for such an amendment before Congress entered upon its serious discussion.[2] Its language was fixed in the Committee of Conference and the amendment was carried in the House by the casting vote of its speaker, Nathaniel Macon,[3] of North Carolina.

The Thirteenth Article[4] was also an amendment making null and void every provision in the original instrument respecting persons "bound to service for a term of years,"[5] and that on the rendition of persons held to service commonly called fugitive slaves. The language of the Thirteenth Amendment is older than the Constitution, having been used in the ordinance of 1787,[6] and in part in the act of 1784.[7] Before its incorporation in the

the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

1 It amended Article II, Section 3.

2 These were William Smith of South Carolina, January 8, 1797; A. Abiel Foster, New Hampshire, February 16, 1799; James Ross of Pennsylvania, January 23, 1800; John Nicholas of Virginia, March 14, 1800; John Dawson of Virginia, October 17, 1803; and Dewitt Clinton, October 21, 1803.

3 See Vol. II, p. 327.

4 Article XIII: Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

5 Article I, Section 3.

6 July 13, 1787, U. S. Statutes at Large, 1, 51.

7 April 23, 1784, Donaldson, Public Domain, 147.

Constitution, it had been used in every organic act for territories formed north of the Ohio and westward to the Pacific, and its language was used in every State constitution which forbade slavery. The addition of this amendment to the Constitution of the United States may with justice be accredited to President Lincoln.

The Fourteenth Article[1] was partly amendatory and

[1] Article XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or re-

partly an addition to the original instrument. Its section, defining citizens of the United States and of the States, and forbidding any State to abridge their privileges or immunities, was new. Its second section, apportioning representation, was amendatory, though that part which provides for the reduction of representation in proportion to the whole number of male citizens in a State which may be denied the right to vote, was an addition to the Constitution; so, too, was the section on office holding and disfranchisement for engaging in insurrection or rebellion against the United States at any time, or giving its enemies aid or comfort. The provision respecting the validity of the public debt and the repudiation of any debt or obligation incurred in aid of insurrection or rebellion, at any time against the United States, or for any claim for loss or emancipation of any slaves, was substantially a new article as nothing of the kind occurs in the original Constitution. This amendment had several originals proposed at different times by different members of Congress. The most practical of these were gathered up by the Joint Committee on Reconstruction and reported as a fourteenth article to be added to the Constitution, but during the progress of this joint resolution

bellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XV: Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

through the Senate its language was greatly changed, and chiefly, by Jacob M. Howard of Michigan, with verbal changes by George H. Williams, a Senator from Oregon. But the spirit, if not the exact language of the amendment, may with justice be attributed to Thaddeus Stevens, of Pennsylvania, and Lyman Trumbull, of Illinois.

The Fifteenth Article was also an addition rather than an amendment, though it mingled the qualities of both, for it clearly changed the provision in the Constitution respecting the unlimited power of each State to prescribe qualifications for electors.[1] Its language is almost identical with a part of the opening clause of the civil rights law of 1866, with which the name of Charles Sumner is identified.

The Constitution of the United States was a growth rather than a creation. The principal precedents for its articles are to be sought in the State constitutions, though many of its provisions were clearly dictated by the obvious needs of a government, which, as Hamilton said in the earliest suggestion on the subject, should be "the common sovereign" with "power sufficient to unite its members together, and direct the common forces to the interest and happiness of the whole." No less comprehensively it embodied the civil experiences of America during the colonial period, and thus conformed to established principles of English jurisprudence and English liberty.

[1] Article I, Section 2, Clause 1.

CHAPTER VII.

LATER EXPOSITION OF THE LAW OF THE CONSTITUTION.

We have said in an earlier chapter that the most famous decision by Marshall's successor, Chief-Justice Taney, was in the Dred Scott case, and that in so far as it was a pro-slavery decision, it was speedily reversed by the results of the Civil War. After the inauguration of President Lincoln and the death of Taney,[1] it may be said that the three departments of the government for the first time held in common Marshall's views of the scope, character and purpose of the Constitution. During the long period from the death of Marshall, in 1835, to the appointment of Chief-Justice Chase, in 1864, while the able and upright Taney was Chief-Justice, the executive and judicial departments were in sympathy, and, for a portion of the time, the legislative also, and they united in interpreting the Constitution strictly according to its letter, as taught in the school of Jefferson. But during this period of twenty-eight years, the Supreme Court did not reverse any of Marshall's decisions.

In almost the last case in which Chief-Justice Taney presided, he denied the authority of the President to suspend the writ of *habeas corpus* at his discretion,[2] holding that its suspension must be by an act of Congress. The decision was handed down in April, 1861, amidst the excitement caused by the firing on Fort Sumter, and at the North was immediately given a political construction as the decision in the Dred Scott case had been. There

[1] Chief-Justice, 1836-1864.

[2] The last case in which the Chief-Justice sat, Ableman vs. Booth, 21 Howard, 506.

was no doubt that the President and the Chief Justice disagreed on the principles of constitutional interpretation. The case gave rise to wide discussion, in which the supporters of the President took issue with the Court, and the supporters of the Chief-Justice took issue with the President.

The majority of Northern people knew little of the case, but most of those who examined it held to the President's views. "The Constitution," said he, "contemplates the question (the suspension of the *habeas corpus*) as likely to occur for decision, but it does not expressly declare who is to decide it. By necessary implication, when rebellion or invasion comes, the decision is to be made from time to time, and I think the man, whom for the time, the people have, under the Constitution, made the commander-in-chief of their army and navy, is the man who holds the power and bears the responsibility of making it. If he uses the power justly the people will probably justify him; if he abuses it, he is in their hands to be dealt with by all the modes they have reserved to themselves in the Constitution."[1]

The decision called forth many personal opinions, of which all written by Republicans sustained the President's position, and all written by Democrats did not attack it.[2] Two years after President Lincoln's death, another case involving the same question reached the Supreme Court,[3] which decided that the President cannot suspend the writ himself, unless authorized to do so by Congress. Lincoln's suspension of it in 1861 had been almost immediately ratified by that body. He had acted

1 Letter to M. Birchard and others, June 29, 1863; Lincoln's Works, II, 361.

2 See Campbell's Pamphlets, Philadelphia, 1862.

3 Ex parte Milligan, 4 Wallace, 114 (1867).

in accordance with the principle that in time of public danger, so imminent and grave, as to admit of no other remedy, the President, as Chief Executive and Commander-in-Chief of the army and navy of the United States, was justified in suspending the writ under the pressure of visible public necessity, and that Congress had merely done its duty in passing the act ratifying his conduct.[1]

It was to be expected that the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments would soon result in a modified, if not a new interpretation of the law of the Constitution, and particularly that of the character of the Government of the people of the United States, and of the rights and privileges of its citizens. Until the Civil War, the General Government was usually referred to as a Federal Government, or the Confederacy,—the word Confederacy always being used by Southern statesmen, and with few exceptions by Northern also. In the debates with Douglas, in 1858, and in a few of his earlier State papers, Lincoln spoke of the General Government as a Confederacy. But as soon as the Confederacy of the slaveholding States was formed, the term was applied exclusively to it, and was abandoned at the North for the word Nation. This synonym for the government of the whole people is older than the Constitution,[2] but it was used more or less vaguely by speakers and writers as late as 1861. We have seen how the word *national* was struck out twenty-six times from the first draft of the Constitution, and the words, Government of the United States substituted. It is difficult to fix the exact time or occasion when the word Nation was first employed to describe the

1 Halleck's International Law, 380.

2 For the use of the word Nation in the earlier plans for Colonial union see Vol. I, Book I, Chap. vi.

Government of the American people, but there is reason to believe that one of the first uses of the word in this sense was made by President Lincoln in his Gettysburg address, in which he spoke of the Government of the People, as that of "a new Nation conceived in liberty and dedicated to the proposition that all men are created equal."[1] Certain it is that after the Gettysburg oration, the word nation was freely used by the people in the sense in which it is now understood; and this larger meaning was given to it in the debates in Congress, in reports of committees and in decisions of the Supreme Court. Not infrequently the words nation and national were spelled with an initial capital, and during the campaign of 1876 there arose a common saying, that we had become a nation with a big N. Meanwhile the terms confederacy and confederation dropped out of use except as referring to the League of 1781 or to that of the insurrectionary States of 1861. Our literature quickly responded to the change in popular speech, and was enriched by several works of wide influence, among which the most famed in its day bore the title "The Nation," under which term was to be found the civil organism and the basis of political life in the United States.[2] Thus the old word which means originally a new birth was given a new meaning, but truly its old meaning was restored and was given the most important place in our political vocabulary. It signified that the American people grasped the character, scope and functions of their Government and understood them in a broader and more

1 November 19, 1863. For the earlier use of the term by Senator Wade, see pp. 612-615 of Vol. II.; and the word was frequently used by some of the later Whig leaders, notably Henry Wilson of Massachusetts and William H. Seward, during the campaigns of 1844, 1848 and 1852.

2 The Nation, Elisha Mulford, 1881.

philosophical sense than before. The change was one of the most important results of the war.

Henceforth the Constitution was to be interpreted in conformity to the national character of the Government. In this test the southern Confederacy of 1861 was an unlawful assembly, without power to take, hold or convey a valid title to any kind of property.[1] The courts which this Confederacy organized were a nullity and exercised no rightful jurisdiction.[2] And the debts or obligations which it incurred were illegal and void.[3] Thus, after the war, political opinion confirmed the decision of Chief-Justice Marshall, given forty years before the war, that the United States formed a single Nation.[4] The question of the right of secession was at last settled.

We have seen how, soon after the inauguration of the National Government, a struggle began involving its federal relations, and that all through the years preceding the war, these were the subject of endless and acrimonious controversy.[5] State sovereignty and national sovereignty seemed to be the poles of our political existence; and to the practical questions involved there seemed no answer. The Civil War made clearer than before the relations of the National Government to the States and enabled the people better to understand the meaning of such terms as State, Commonwealth and Union. For the first time the term State as used in the Constitution was authoritatively defined as a political community of free persons occupying a territory of defined boundaries organized under a government sanctioned and limited by a written Consti-

1 Sprott vs. United States, 8 Court of Claims, 499; 20 Wallace, 469.

2 Hickman vs. Jones, 9 Wallace, 197.

3 Constitution, Article XIV, Section 4.

4 Cohens vs. Virginia, 6 Wheaton, 264 (1821).

5 See Chaps. III and IV. See In re Neagle, 135 U. S. 84.

tution, and established by the consent of the governed.[1] Until 1865, the Union of the States had been generally considered as more or less a purely artificial and arbitrary relation established among them. This idea was now abandoned and the Union was understood to express an organic relation growing out of the common origin, the mutual sympathies, the kindred principles and the similar interests of the American people; and from the nature of this origin the Union was now considered to be indissoluble.[2] The preservation of the States and the maintenance of their governments were now recognized to be as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. "The Constitution in all its provisions," said Chief-Justice Chase, in 1868, "looks to an indissoluble Union composed of indestructible States."

The old thorn of State sovereignty was withdrawn and the functions of the National Government and of the State governments were better understood. For the first time the broad significance of Marshall's opinion uttered earlier in our history, was comprehended by the people, that the National and State Governments are each sovereign with respect to the objects committed to it, but not sovereign with respect to the objects committed to the other.[3] The darkness which had so long enshrouded the idea of State sovereignty cleared away disclosing the true sovereignty of the State, which resides not in the persons who fill the different departments of its government, but in the people from whom the government emanates and who may change it at their will. Few lessons of the Civil War were

[1] Texas vs. White, 7 Wallace, 700 (1868).

[2] Ib.; Chancely vs. Barley, 37 Georgia, 532.

[3] McCullough vs. Maryland, 4 Wheaton, 316 (1819); United States vs. Cruikshank, 92 United States, 542.

more valuable than its demonstration that sovereignty abides with the constituency and not with the agent; that it exists with the people of a State and not in a State as a political corporation.[1] To the term State this organic and human idea of sovereignty gave a new meaning. It made clear that a State in becoming a member of the Union enters into an indissoluble relation and becomes an organic part of the Nation. Consequently no States can secede from the Union,[2] and ordinances of secession are absolutely null.[3] Because of this relation secession or rebellion cannot alter the constitutional duties and obligations of a State or in any way change the allegiance which its people owe to the National Government; nor can a State release its citizens from that allegiance. "Since the State itself is a fractional part of a magnificent whole and in its collective capacity is only the aggregation of its individual citizens all of whom are alike incapable of effecting their own release, whether taken individually or collectively."[4] Because of the intimate and organic relation between the National Government and the States and because of the supremacy of the Nation, Congress has plenary and paramount jurisdiction over all matters with which it is entrusted by the Constitution, and in the enforcement of its acts it may utilize State laws and State officials.[5]

To avoid jealousies and conflicts of jurisdiction the

1 Spooner vs. McConnell, 3 McLean, 337.

2 White vs. Hart, 13 Wallace, 646; Sequestration Acts, 30 Texas, 688.

3 Hawkins vs. Filkins, 24 Arkansas, 286; Harlan vs. State, 41 Mississippi, 556.

4 Hood vs. Maxwell, 1 West Virginia, 219.

5 Ex parte Siebold, 100 United States, 371 (1879); Serè vs. Pitot, 6 Crouch, 336; Murphy vs. Ramsey, 114 U. S., 41; U. S. vs. Gratiot et al., 14 Peters, 524, 537.

operations of the State and National Governments are conducted separately as far as possible, but at the basis of jurisdiction lies the principle that the supreme allegiance of every citizen is due to the National Government. This principle was not recognized in the State constitutions until after the war. While as to the question of power there could be no doubt of the truth of the principle, there might be a question of expediency, and this could be settled from time to time as Congress in its wisdom might determine. The war set the concurrent jurisdictions of the State and National Governments in tolerably clear perspective. Without concurrent sovereignty "the National Government would be nothing but an advisory government, and its executive power absolutely nullified.[1] Thus the war only emphasized the old doctrine clearly laid down by Marshall and the Fathers generally, that though the States are sovereign as to all matters which have not been granted to the jurisdiction of the nation, the Constitution and all laws made in accordance with it, are the supreme law of the land;" a truth which it has been well said is "the fundamental principle on which the authority of the Constitution is based."[2] The Thirteenth, Fourteenth and Fifteenth Amendments reorganized government in America, and chiefly in three ways: first, by changing the basis of representation; secondly, by defining United States citizenship, and thirdly by affecting the elective franchise. The utmost effect of the Thirteenth amendment was to declare the colored race as free as the white, but it gave that race nothing more than its freedom.[3] It forever deprived the State governments and the National Government of the power to reduce any person to the condition

[1] Id.
[2] Id.; also Tarble's Case, 12 Wallace, 397 (1871).
[3] Bowlin vs. Commonwealth, 2 Bush. 5.

of slavery or involuntary servitude, except in punishment for crime.[1] It made all former slaves citizens of the United States.[2] It will be remembered that several southern States when ratifying this amendment, and notably South Carolina and Florida, expressed the fear that Congress would exercise its power to enforce the article so as to extend the elective franchise to the negro, and to interfere in police regulations of the States.[3] But their fears were groundless for no such power was given by the article, as it gave no authority to Congress to usurp the authority of the State governments.[4]

Who are citizens of the United States was first defined by the Fourteenth Amendment. But persons may be citizens of both the national government and the State government, or of the one without being citizens of the other.[5] The term *citizen* does not include Indians, but an Indian who is taxed and has severed his tribal relations is a citizen.[6] The main purpose of the amendment was to establish the citizenship of the negro,[7] and to protect the privileges and immunities of citizens of the United States from hostile State legislation;[8] therefore, it is a restraint on the States limiting the exercise of their powers which can affect the individual or his property,[9] but the amend-

1 People vs. Washington, 28 Cal. 658.

2 United States vs. Rhodes, 1 Abbot, U. S. 28.

3 See ante, pp. 195, 196, 220.

4 U. S. vs. Cruikshank, 92 U. S. 543; 1 Wood, 308; United States vs. Harris, 106 U. S. 629; State vs. Rash, 1 Houston Del. Criminal Reports, 271.

5 Slaughter House Cases, 16 Wallace, 74; United States vs. Cruikshank, 92 U. S. 543; 1 Woods, 308.

6 United States vs. Elm, 23 Int. Rev. Rec. 419.

7 Slaughter House Cases, 16 Wallace, 36.

8 United States vs. Harris, 106 U. S. 629.

9 San Mateo Company vs. Southern Pacific R. R. Co., 8 Sawyer, 238.

ment did not confer the right of citizenship on Chinamen, except such as are born in the United States.[1]

The amendment though prohibiting abridgment of the privileges of citizens of the United States, does not forbid the abridgment of their privileges as citizens of the States, for it was not intended to invade the rights of the States to regulate the privileges and immunities of their own citizens.[2] For this reason that portion of the Civil Rights Bill of 1866, which attempted to secure to all citizens the right to equal accommodations at inns and similar public places and in public conveyances and at places of amusement, was unconstitutional and not within the power of Congress.[3] It is by this amendment that the States are prohibited from denying to any person within their jurisdiction "the equal protection of the law," by which phrase is signified an equal right to resort to the courts for redress of wrongs, the enforcement of rights and the exemption from unequal burdens or exactions of any kind. Equal protection of this kind is denied when taxation is not uniform and equal and does not require both uniformity in the rate and in the mode of assessment.[4]

While securing citizenship for the colored race the Fourteenth Amendment did not confer upon that race privileges and immunities not enjoyed by the white race. It gave the negro citizenship, but citizenship does not imply the possession of all political rights,[5] for the elective franchise is not a natural right or immunity.[6] It declared all

1 State vs. Ah Chew, 16 Nevada, 51.

2 Ex parte Kinney, 3 Hughes, 1; Green vs. State, 58 Arkansas, 190.

3 Civil Rights Cases, 3 Supreme Ct. Rep., 18, 33; per contra United States Newcommer, 11 Philadelphia, 519.

4 Railroad Tax Cases, 13 Federal Rep., 722; 18 Federal Rep., 385; see also The Income Tax Cases, 158 U. S., 609 (1895).

5 People vs. De La Guerra, 40 California, 311.

6 Minor vs. Happersett, 21 Wall., 162; United States vs. Cruikshank, 92 U. S., 542; Van Valkenburg vs. Brown, 43 California, 43.

persons born in the United States to be citizens, but the amendment was not self-executing and did not make the persons for whom it was primarily designed voters.[1] It made clear that Congress can legislate in protection of the rights of citizens of the United States only as such citizens, and not as citizens of a State.[2]

The amendment was not intended to transfer to the National Government the protection of all civil rights or to bring within the jurisdiction of Congress the entire domain of civil rights which had before belonged exclusively to the States.[3] The protection of life and personal liberty in America rests in the States alone.[4] But the provision in the amendment which empowers Congress to enforce it brings within the jurisdiction of the National Government any atrocity, private outrage or intimidation in any form growing out of the relation between the black and white races,[5] and in case a State does not conform in its laws to the requirements of the amendment, Congress may authorize its enforcement by suitable legislation.[6] The legislation authorized is corrective in character and is such as may be necessary for restraining or correcting the effects of State laws in conflict with the amendment.[7] The amendment in its large and comprehensive meaning, therefore, as affecting United States citizenship places the jurisdiction of the citizenship in the hands of the National Government.

The Fifteenth Amendment did not confer the right of

1 Spencer vs. Board, 1 McArthur, 169.

2 United States vs. Cruikshank, 92 U. S., 560; 1 Hughes, 536.

3 Slaughter House Cases, 16 Wall., 36.

4 United States vs. Cruikshank, 92 U. S., 542; 1 Woods, 308.

5 Id.

6 United States vs. Harris, 106 U. S., 629.

7 Civil Right Cases, 3 Sup. Ct. Rep., 18.

suffrage on any person;[1] but it invested every citizen of the United States with a new right which Congress is empowered to protect.[2] The amendment is expressed in the negative form for reasons which its history, already narrated, discloses.[3] It took from the States authority to discriminate against citizens of the United States on account of race, color or previous condition of servitude, and as the Fourteenth Amendment made colored persons United States citizens, discrimination against them was forbidden. But with the exception of the discrimination on account of race, color or previous condition of servitude, a State may prescribe such restrictions or qualifications for the exercise of the suffrage as it may think best.[4] Thus a State may limit the elective franchise to persons of the male sex or to those who are able to read and write, or who pay a personal or property tax.

At the time of the adoption of the Fifteenth Amendment in 1870, the State constitutions, with few exceptions, limited the right to vote to white males of the age of twenty-one years, who had resided for a required period within the State. The Fifteenth Amendment annulled the discriminating word, white, and thus changed the constitutions of northern as well as of southern States. By the obliteration of a long-standing discriminating word, the negro was left to enjoy the same rights as white persons. If a State should adopt a constitutional provision limiting the right to vote exclusively to white persons, the Fifteenth Amendment would act practically to confer the right to

1 Minor vs. Happersett, 21 Wall., 178 (1874); United States vs. Cruikshank, 92 U. S., 555; 1 Woods, 308; United States vs. Reese, 92 U. S., 214; Anthony vs. Haldeman, 7 Kansas, 50; Hedgeman vs. State, 26 Mich., 51.

2 In re Cruikshank and Reese as above.

3 See Chapters IV, V.

4 Van Valkenburg vs. Brown, 43 Cal., 43.

vote on the negro, and Congress has power to protect and enforce this right.[1] A vestige of the old discrimination against the negro race may still be found in the constitutions of eight northern and of two border States,[2] but for thirty years the now curious, but once discriminating word, white, which remains in those constitutions is made meaningless, and were these States to adopt new constitutions, this last vestige of the old order would disappear. One of the important changes effected by the Fifteenth Amendment consists in its authorization of Congress to protect citizens in rights which the amendment creates or which are dependent upon it.[3]

The general character of the later exposition of the law of the Constitution has been well exemplified in the platforms of national parties. In 1868, the Democratic party platform pronounced all the reconstruction acts of Congress "unconstitutional, revolutionary and void,"[4] and at the same time the Republicans congratulated the country on the assured success of the reconstruction policy of Congress as shown by the adoption of constitutions in most of the late insurrectionary States "securing equal civil and political rights to all."[5] It was in this platform of 1868, on which Grant and Colfax were nominated by the Republicans, that the words nation and national were for the first time spelled with a capital letter. The Republican platform of 1872, on which Grant was renominated, repeated this spelling of the words,[6] but in the

1 United States vs. Reese, 92 U. S., 214.

2 Wisconsin, 1848; Michigan, 1850; Kentucky, 1850-1890; Ohio and Indiana, 1851; Iowa, 1857; Minnesota, 1858; Oregon, 1859; Nevada, 1864; Maryland, 1867.

3 United States vs. Reese, 92 U. S., 214.

4 Democratic Convention, New York, July 4-11, 1868.

5 Republican Convention, Chicago, May 20-21, 1868.

6 Republican Convention, Philadelphia, June 5-6, 1872.

Democratic platform of the same year, adopted at Louisville, Kentucky,[1] the old term for the Nation was used, Federal Union. In 1876, the Democratic and Republican platforms presented the same contrast. The Republicans of 1872 strongly demanded the enforcement of the Thirteenth, Fourteenth and Fifteenth amendments, to which subject the platform of their opponents made no reference. But in 1876, the platform on which Tilden and Hendricks were nominated, affirmed the devotion of the Democratic party to the Constitution "with its amendments universally accepted as a final settlement of the controversies which had engendered Civil War."[2]

It was not until 1876, the centennial of American independence, that any political party proclaimed that "the United States is a Nation not a league." The Republicans in the same clause in which they announced this profound constitutional truth, also defined our dual civil system as "the combined workings of national and State governments." This idea, clear enough to us now and undoubtedly an ever present force in the evolution of American government from the beginning, was not realized by the people until after the war. The mighty changes wrought during the first century of the Republic were well expressed in the saying, which became true after the Centennial year, that the United States of America is a Nation not a league. This concept of our National Government may be contrasted with that expressed in the platform on which Buchanan and Breckinridge were elected in 1856,—that the Democratic party would abide by the principles laid down in the Kentucky and Virginia resolutions of 1798, and that it adopted them as the main foundations

1 Democratic (straight out) Convention, September 3, 1872.
2 Democratic Convention, St. Louis, June 27-29, 1876.

of its political creed.[1] We have seen how throughout the evolution of our government the two ideas which have stood in sharpest antagonism and between which there is a bridgeless gulf, are the doctrines of '98 and the principles of national sovereignty.

The later exposition of the law of the Constitution has tended to enlarge the jurisdiction of the United States beyond the limits assigned it by many of our earlier statesmen, even of the broad construction school. While many decisions might be cited in proof of this assertion, a few will suffice. The extraordinary stimulus which the war gave to all kinds of industry bred the habit among the people of looking with toleration upon this extended jurisdiction. Of this the legal tender cases afford an illustration.

In February, 1862, and by subsequent acts, Congress empowered the Secretary of the Treasury to issue United States notes making them a legal tender. They circulated among the people as money, but fluctuated greatly in value, and gradually, as the credit of the Government was fully established, they passed among the people as the equivalent of gold and silver coin. The Court of Appeals of the State of New York decided that they were money, and therefore, taxable as cash. But this decision was reversed by the Supreme Court of the United States in 1868, the Court holding that these notes, or, as they were called, greenbacks, were securities but not money.[2] While the New York case was on its way to a final decision, a similar one involving the legal tender quality of the notes had arisen in Kentucky, and reached the Supreme Court

[1] Democratic Convention, Cincinnati, June 2-6, 1856; also found in the platform of the Democratic party adopted at Baltimore, June 1-4, 1852.

[2] The Bank vs. Supervisor, 7 Wall., 26.

about the same time. The opinion was delivered by Chief-Justice Chase, in 1869.[1] The Court at this time consisted of eight members, of whom five held, that inasmuch as the act of 1862, by construction declared these notes to be legal tender in payment of pre-existing debts, it was inconsistent with the principles of the Constitution and was not a law necessary and proper for carrying into execution the powers vested in the national government. The Chief-Justice was Secretary of the Treasury at the time the law had been enacted, and was, indeed, its author. His judicial opinion, therefore, was considered a reversal of his opinion as Secretary in 1862. He now held that the nearly four hundred millions of dollars in paper which had been issued under the various acts, were not a legal tender, and that the cause of their free circulation among the people was their quality of receivability for public debts, and not their quality as legal tender notes; therefore, the acts creating them were unconstitutional. Four of the associate justices agreed with the Chief-Justice, but three dissented; Mr. Justice Miller holding that the acts were necessary and proper to execute the powers vested by the Constitution in the National Government, and that Congress had the choice of means and was empowered to use any which in its judgment might bring about the end desired.

The Republican party, which controlled both Houses of Congress at this time, and President Grant, did not sympathize with the decision of Chief-Justice Chase. The party leaders determined to make possible a decision more favorable to their views, and an act maintaining the judicial system of the United States was passed by which the Supreme Court was enlarged so as to consist of nine

1 Hepburn vs. Griswold, 8 Wall., 603.

Justices, of whom six should constitute a quorum.[1] Mr. Justice Grier soon after resigned and President Grant nominated and the Senate confirmed the appointment of William Strong, of Pennsylvania, and Joseph P. Bradley, of New Jersey, to fill the two vacancies in the Court. It was known that Strong and Bradley did not hold to the opinion of Chief-Justice Chase, as to the constitutionality of the legal tender acts. Another case involving the legal tender quality of the notes reached the Court in the December term, 1870, and was decided on the first of May following. The decision handed down by the Chief-Justice the year before was reversed and the legal tender acts were held to be constitutional both as affecting contracts made before their enactment and those made afterward; and the opinion of the minority in the former decision was now elaborated by Mr. Justice Strong as the opinion of the Court. But he greatly enlarged the scope of the inquiry, so that it now comprehended the fundamental question whether Congress could give the quality of money to United States notes. To this query the decision of the Court was a complete answer. It asserted that Congress has power to legislate; that the promise of the government to pay money, that is, the legal tender notes, should be for the time being equivalent in value to gold and silver coin and that a contract calling for dollars could be legally fulfilled by the promise of the government to pay dollars.[2] From this opinion Chief-Justice Chase and Justices Nelson, Field and Clifford dissented, holding that the decision would sustain an emission of paper currency; that the Constitution forbids any State to make anything but gold and silver a legal tender, and that the National Government can constitutionally do no more than coin gold and silver

1 Act of April 10, 1869; Statutes at Large, XVI, 44.
2 The Legal Tender Cases; 12 Wall., 457 (1871).

and regulate its value and that of foreign coin. The government could emit Treasury notes as a means of borrowing money, but it could not make them money or a legal tender for money.

Twelve years later a third case involving the legal tender quality of the notes reached the Court, and its inquiry into the principle involved was carried further than before.[1] In the earlier decision[2] the constitutionality of the legal tender acts had been sustained on the ground that they came within the power of Congress to declare war, and therefore, this power imparted a legal tender quality to United States notes. But in the case now before the Court, the question was enlarged. Could such notes issued in time of war under acts of Congress, declaring them to be a legal tender in payment of private debts, and afterward in time of peace, redeemed and paid in gold coin at the Treasury, and then re-issued under the act of 1878,[3] be constitutionally a legal tender in payment of such debts? In answering this question the Court fell back on the reasoning of Chief-Justice Marshall as to the scope and extent of the implied powers of Congress.[4] Marshall held that the people of the United States, by the Constitution had established a National Government with sovereign powers, legislative, executive and judicial, and his definition was now applied to its full extent. The great Chief-Justice had delivered a judgment, said the Court, adverse to the powers of the States to issue legal tender notes. He had sustained the power of Congress to charter a bank, whose issue circulated as money, and the application of the principle which he had elucidated as recorded in the

1 Juilliard vs. Greenman, 110 U. S., 421 (1883).
2 Hepburn vs. Griswold.
3 May 31, 1878, Statutes at Large, XX, 87.
4 McCullough vs. Maryland, 4 Wheaton, 316 (1819).

practice of the Government, satisfied the Court that the constitutional authority of Congress to provide a currency for the whole country was now firmly established.[1] This granted it followed that Congress might constitutionally secure the benefit of such a currency to the people by proper legislation. The prohibition in the Constitution against the emission of bills of credit by the States, and against making anything but gold and silver coin a tender in payment of debts, did not prove that a like limitation of Congress was to be inferred.

Indeed, the very limitation expressed in the Constitution against State emissions was evidence that no like limitation was intended on Congress. The logical and necessary consequence, then, was that Congress has power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency, for the purchase of merchandise and the payment of debts "as accord with the usage of sovereign governments." Under the power to borrow money on the credit of the United States, Congress has as broad an authority as it has over a metallic currency under the power to coin money. Taking the two powers together, that of coining and that of borrowing money, Congress is authorized to establish a national currency either in paper or coin, and to make either of them lawful money for all purposes as regard the national government or private individuals. And this power of Congress to issue legal tender notes is not merely a war power but is equally within its discretion in time of peace. The wisdom of Congress would therefore determine when the exigency might arise, a political not a judicial question. For these reasons the Court sustained the constitutionality of the act of 1878, and held that Treasury notes were a legal tender in payment of private

[1] Veazie Bank vs. Fenno, 8 Wall., 533.

debts and could be reissued and kept in circulation.[1] The act of 1878, the constitutionality of which the Court had sustained, forbade a further retirement of the United States Treasury notes and directed that when redeemed at the Treasury they should not be cancelled or destroyed, except those which were too mutilated for further use, but should be reissued, paid out again and kept in circulation. The act of January, 1875, had provided for the resumption of specie payments on the first of January, 1879, and for the redemption of Treasury notes but the later provision was annulled by the act of 1878. The re-issue clause in the last named act became at once a bone of contention between parties. Its expediency, and, of course, its constitutionality, were insisted on by the Republicans. But the Democrats insisted that its prohibition of the retirement of the notes put the Government "in the anomalous situation of owing to the holders of its notes, debts payable in gold on demand which could never be retired by receiving such notes in discharge of obligations due the government, nor cancelled by actual payment in gold." It was forced to pay without redemption and to pay without acquittance.[2] It, therefore, worked as an endless chain emptying the national Treasury of gold.

Mr. Justice Field gave a dissenting opinion in the case, in which he reviewed the history of the bills of credit in the country, and of the clause relating to the subject in the Constitution; and particularly the history of the legal tender acts and of the act of 1878. "Why," inquired he, "should there be any restraint upon unlimited appropriations by the Government for all imaginary schemes, if the printing press can furnish the money that

[1] Guilliard vs. Greenman, 110 U. S., 421 (October, 1883).

[2] Message of President Cleveland, December 2, 1895; Richardson, IX, 642.

is needed for them?" If Congress possesses the power to make Treasury notes a legal tender and pass as money or its equivalent, why should it not issue a sufficient amount to pay the debt of the United States? His reasoning led him to the conclusion that the decision of the Court was inconsistent with the letter and spirit of the Constitution.

The final decision of the Court in the legal tender cases was promptly utilized by the National Greenback party, which, in its platform of 1884, declared that the decision fully vindicated the party's theory of the right and authority of Congress to issue legal tender notes, and demanded the issue of such money in sufficient quantities to supply the actual needs of trade and commerce; and also demanded that Treasury notes should be substituted for national bank notes, and the public debt be promptly paid with them.[1]

A further illustration of the trend of later expositions of the law of the Constitution in so far as it affected the jurisdiction of the United States, was given in 1889, in the decision in the greatest of all the Utah cases, that relating to the disestablishment of the Mormon church.[2] According to this decision, the power of Congress over the territories of the United States is general and plenary and arises from the right to acquire territory and from the power to make all needful rules and regulations respecting the territory or other property belonging to the United States. The principle which Chief-Justice Marshall had long before decided,[3] the Court reaffirmed, namely, that the power of the United States to acquire

[1] Greenback National Convention, Indianapolis, Indiana, May 28, 1884.

[2] Mormon Church vs. United States, 136 U. S., 1-44. See also Jones vs. The U. S., 137 U. S., 202, 212; Lyon et al. vs. Huckabee, 16 Wallace, 414, 434.

[3] American Insurance Company vs. Canter, 1 Peters, 511 (1828).

territory is derived from the treaty making power and the power to declare war. The power to make acquisition is incident to national sovereignty. The United States having obtained territorial government imposed laws upon it, therefore Congress might legislate directly for its local government and has complete legislative authority over its people. In the exercise of this sovereign authority, Congress annulled the charter of the Mormon church, confiscated its property and devoted it to public purposes. The great and far reaching principle in the decision was that the regulation of a territory by Congress depends solely on its discretion.[1]

In another Utah case the Supreme Court examined more in detail the power of Congress to regulate the domestic affairs of a territory.[2] The people of the United States, said Mr. Justice Matthews in the decision, are sovereign owners of the national territories, and have supreme power over them and their inhabitants. In the exercise of this sovereign domain they are represented by the Government of the United States to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms or in the purpose or object of the power itself; for it may well be admitted in respect to this as to every power of society over its members that it is not absolute and unlimited. But in ordaining government for the territories and the people inhabiting them, all the discretion which belongs to the legislative power is vested in Congress, and that extends beyond all controversy, to determine by law from time to time the form of a local government in a particular ter-

1 Consult McAllister vs. U. S., 141 U. S., 174; Clinton vs. Englebrecht, 13 Wallace, 434.

2 Murphy vs. Ramsey, 114 U. S., 44.

ritory and the quality of those who shall administer it. It rests with Congress to say whether in a given case any of the people resident in the territory shall participate in the election of its officers, or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred or at any time modify or abridge it as it may deem expedient. The right of local self-government is known to our system as a constitutional franchise, and belongs, under the Constitution, to the States and to the people thereof by whom that Constitution was ordained and to whom, by its terms, all power not conferred by it upon the Government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the territories are secured to them as to other citizens, by principles of constitutional liberty which restrain all the agencies of government, State and national. Their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.[1]

This interpretation of the law of the Constitution may well be contrasted with that political interpretation so long enthroned in power,—that Congress had no authority to legislate as to slavery in the territories, and the decision becomes of extraordinary interest in connection with the extension of the jurisdiction of the United States over Porto Rico, Hawaii and the Philippines in 1898. If the construction of the Constitution which this decision and others which it cited made is to regulate the government of these new acquisitions, then the American people, acting through Congress, can forbid the people of any of these new acquisitions to assemble for the purpose of political

[1] See also Gibson vs. Choteau, 13 Wallace, 92, 99; Fleming vs. Page, 9 Howard, 603, 615, and Halleck's International Law, 3d Ed., II, 475.

discussion, to petition our Government for redress of grievances, and to bear arms. If this construction prevails, Congress can provide for searches and seizures of the persons dwelling in these acquisitions, and of their houses, papers and effects, in modes that have been recognized as illegal when employed in any American Commonwealth.[1] But the new constitutional questions involved in the results of the Spanish-American war may well be left to the future for settlement.[2]

The decision in the Utah cases, far-reaching as their political effects might ultimately prove, did not attract great public attention at the time. It was not until 1895

[1] "The People of the United States," by Simeon E. Baldwin, LL. D., Yale Law Journal, January, 1899. But see Webster vs. Reid, 11 Howard, 460; American Publishing Co. vs. Fisher, 166 U. S., 464; Springville vs. Thomas, 166 U. S., 707; Reynolds vs. U. S., 98 U. S., 145.

[2] Among these questions are the following respecting the new acquisitions:

Are the provisions of the Fourteenth and Fifteenth Amendments to be extended to their inhabitants? Are they citizens of the United States, and, therefore, entitled to all the immunities and privileges of such persons? Is manhood suffrage to be permitted among them? Does the Constitution authorize the organization of States, in the sense in which the word is used in American constitutional law, out of islands remote from the United States and having no ties or connection with this country? Can Congress organize a territorial and colonial government of a military type, for these possessions, and can it govern them in any other way than that which it has pursued in regulating the territories of the United States? The doctrine that the United States can acquire territory for the sole purpose of organizing it into States in the Union originated in the Decision of Chief-Justice Taney in the Dred Scott Case, 19 Howard, 393-446, 447. See Report on the Legal Status of the Territory and Inhabitants of the Islands Acquired by the United States During the War With Spain, Considered with Reference to the Territorial Boundaries, the Constitution, and Laws of the United States, by Charles E. Magoon, Law Officer, Division of Insular Affairs, War Department, Washington, Government Printing Office (February), 1900. 72 pp.

that the Court, through one of its decisions, aroused public interest to a degree scarcely inferior to that provoked twenty-eight years earlier by the Dred Scott case. In 1894 Congress passed a tariff act, known as the Wilson-Gorman law, containing a provision for an income tax, which, it was supposed, would produce about forty million dollars of revenue. To the extent of this amount the act reduced taxation on imports. The purpose of the law was to compel every person, whose yearly income from any source exceeded four thousand dollars, to pay a two per cent tax, from 1895 to 1900.[1] A case soon reached the Court involving the constitutionality of the act.[2] The Court, in sustaining the law, in its decision handed down on the eighth of April, 1895, held that a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution, and that a tax upon incomes derived from the interest of bonds issued by a municipal corporation, is a tax upon the power of the State and its instrumentalities to borrow money, and, consequently, is repugnant to the Constitution.

On other questions involved in the case, the Court was divided; these were, whether the provision as to rents and income from real estate invalidated the whole act; whether, as to the income from personal property as such, the act was constitutional because laying direct taxes; and whether any part of the tax, if not considered as a direct tax was invalid for want of uniformity on either of the grounds suggested. In so far as a decision was reached, the constitutionality of the act was sustained by five justices, but denied by four. Mr. Justice Field did not hesitate to say respecting the proposed tax on incomes, in the act, that the assault upon capital would be but the

[1] Act of August 27, 1894; Statutes at Large, XXVIII, 553.

[2] Pollock vs. Farmer's Loan and Trust Company, 157 U. S., 429.

beginning, and that political contests in the United States would become a war of the poor against the rich, "a war constantly growing in intensity and bitterness." It was his opinion that the whole act should be declared void. Mr. Justice White, who sustained the constitutionality of the act, pointed out the injustice and harm which must always result from the overthrow of practice long sanctioned by the decisions of the Court. Under the income tax laws of the past, which covered every conceivable source of income, vast sums, he said, had been collected from the people. "The decision here rendered," observed he, "announces that those sums were wrongfully taken, and, thereby, it seems to me, creates a claim against the government for an enormous amount of money."

Another case involving the constitutionality of the act meanwhile came up,[1] and because the first had not been heard by a full Court, and the Court had been evenly divided, the cases were re-argued before the full bench. A decision was given by Chief-Justice Fuller, on the twentieth of May, 1895. Public interest was now thoroughly aroused, and political parties were already aligning themselves on the possible decision. The case, like that of Dred Scott, in 1857, involved political issues, and, in this case, an interpretation of the meaning of direct taxes under the Constitution. The question before the Court, said the Chief-Justice, involved the exercise of a great governmental power and brought into consideration, "as vitally affected by the decision, that complex system of government so sagaciously framed to secure and perpetuate 'an indestructible Union composed of indestructible States.' "[2]

Of scarcely less interest than the principle at issue was

[1] Hyde vs. Continental Trust Company, 158 U. S., 601.
[2] Texas vs. White, 7 Wallace, 700 (1868).

the manner in which the Chief-Justice approached its solution. He began with a quotation from one of Marshall's greatest decisions, that "in considering this question we must never forget that it is a Constitution that we are expounding."[1] And again, that the words of the Constitution are to be taken in their obvious sense and to have a reasonable construction.[2] For this reason the words, direct taxes and duties, imposts and excises, were used in the Constitution in their natural and obvious sense. Here he discussed the views of Hamilton and Madison in one of the earlier cases,[3] and referred to the construction of the Constitution by the authors of the Federalist as an authority which "should not and cannot be disregarded." He inquired, whether, whatever speculative views political economists and revenue reformers might entertain, could it be properly held that the Constitution, taken in its plain and obvious sense and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate; although the tax was imposed merely because of ownership and with no possible means of escape from payment, and belonged to a totally different class from that which included the property from which the income proceeded?

The Chief-Justice found it impossible to hold that a fundamental requisition respecting taxation deemed so important as to be enforced by two provisions[4] in the Constitution, one affirmative and one negative, could be refined away "by forced distinctions between that which gives value to property and the property itself," and he could

1 McCullough vs. Maryland, 4 Wheaton, 316 and 407.

2 Gibbons vs. Ogden, 9 Wheaton, 1, 188.

3 Hylton vs. United States, 3 Dallas, 171 (February, 1796).

4 Constitution, Article I, Section 2, Clause 3, and Section 8, Clause I.

not conceive any ground why the same reasoning did not apply to capital in personalty held for the purpose of income and to the income arising from it. "All the real estate of the country, and of its invested personal property, are open to the direct operation of the taxing power, if an apportionment be made according to the Constitution." This instrument, he said, does not declare that any direct taxation shall be laid by apportionment on any other property than land, but on the contrary "it forbids all unapportioned direct taxes," and he knew of no warrant for excepting personal property from the exercise of the power or any reason why an apportioned direct tax could not be assessed. Counsel in the case had held that an income tax was not a property tax at all; that it was not a real estate tax, nor a crop tax, nor a bond tax; but that it was "an assessment upon the tax paper on account of his money spending power as shown by his revenue for the year preceding his assessment." If this doctrine was true, remarked the Chief-Justice, then rents, crops and interest lost all connection with their sources, and though not taxable in their original source were transmuted into a new and taxable form. In other words, counsel held, "that income is taxable irrespective of the source whence it is derived." This construction of the principle of an income tax was applied by Mr. Pitt, in 1799, and was sustained, fifty-five years later, by Mr. Gladstone, as rational.

The Court was unanimous in the opinion that so far as the act of 1894 operated on the receipts from municipal bonds, it could not be sustained, because it would be a tax on the power of the States and their instrumentalities to borrow money, and therefore, repugnant to the Constitution. If, as counsel contended, the act, even in this respect, would be constitutional, and interest when received became

merely money in the recipient's pocket and taxable as money without reference to the source from which it came, the question, said the Court, would be immaterial whether it had been originally taxed or not. Hence, it followed that if the revenue derived from municipal bonds could not be taxed, because the source could not be taxed, the same rule applied to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real estate and personal property equally existed as to the revenue from them. Admitting that the act of 1894 taxed the income of property irrespective of its source, still the Court could not doubt that such a tax would be necessarily a direct tax in the meaning of the Constitution. Being direct tax, therefore, it must be laid by apportionment. If the necessity existed for raising any number of million dollars for the support of the government in addition to the revenue from duties, imposts and excises, Congress could apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess the amount on all real estate or personal property and the income of all persons in the State.

Of course the inquiry arose, whether a general, unapportioned tax on the income of real and personal property could be sustained under the Constitution. It was argued that, if the fundamental law was strictly complied with, that method of taxation would have to be abandoned altogether, because of the inequalities which would necessarily accompany its application. The census of 1890 was utilized to prove that enormous assets of mutual insurance companies, building associations, mutual savings banks and ecclesiastical organizations were exempted from taxation to such an amount that if they had been taxed, the rate which it had been found necessary to fix would

have been reduced one-half. While the Court disclaimed that it was dealing with the Wilson-Gorman act from this point of view, it admitted that the data of the census were substantially reliable. It raised the question whether it might not be doubted, whether if the sum desired to be raised had been apportioned in a State which paid its quota and collected the amount by its own methods, would the State or could it, under its constitution, have allowed a large part of the property above mentioned to escape taxation. If so, a better measure of equality would have been attained than would otherwise have been possible, since, according to the argument of counsel who contended for the constitutionality of the act, "the rule of equality is not prescribed by the Constitution as to federal taxation and the observance of such a rule as inherent in all just taxation is purely a matter of legislative discretion."

The counsel for the Government, who argued for the constitutionality of the act, labored to prove that as the United States was "a representative of an indivisible nationality, a political sovereign, equal in authority to any other on the face of the globe; equal to all emergencies, foreign or domestic, and having had its command for offense and defense and for all governmental purposes all resources of the Nation," would be "but a maimed and crippled creation after all" unless it possessed the power to levy taxes without apportionment on the income of real and personal property throughout the country.

The Court conceded that Congress had power to tax real and personal property and the income from both, if there was an apportionment. Such a tax would be a direct tax in the meaning of the Constitution; yet while conceding this, the Court was asked to hesitate to enforce "the mandate of the Constitution which prohibits Con-

gress from laying a direct tax on the revenue from property of the citizens without regard to State lines and in such manner that the States cannot intervene by payment in regulation of their own resources." And the Court was asked to hesitate lest a government of delegated powers should not be found equal to the demand put upon it. Whether an income tax was or was not desirable, or whether it would enable the government to diminish the tariff duties and to enter upon what, some maintained, would be a reform of its fiscal and commercial system, were questions with which the Court was not concerned. "Questions of that character," said the Chief-Justice, "belong to the controversies of political parties and cannot be settled by judicial decision." In the cases before the Court its province was to determine whether the income tax levied by the act of 1894, on the revenue from property, did or did not belong to the class of direct taxes. If it did belong to that class, it violated the Constitution, because it was unapportioned, and the Court must so declare it. President Cleveland had returned the act of 1894 to Congress without his signature, a fact to which the Chief-Justice adverted; in his annual message of 1893 he had urged a reduction of the tariff duties and the imposition of an income tax "derived from certain corporate investments.[1] The Democratic party, by his election in 1892, stood pledged to tariff reform and the Wilson-Gorman act was passed presumably in fulfillment of this pledge. The refusal of the President to approve the act, and its becoming a law without his signature, indicated that it did not comply with his ideas of reform. According to the census of 1890, the true valuation of real and personal property in the United States was sixty-five billions

[1] December 4, 1893, Richardson IX, 460.

($65,037,091,197), of which thirty-nine billions ($39,544,544,333) constituted the value of the real estate.

Commenting on these data, in their relation to the act under consideration, the Chief-Justice observed, that in applying that portion of the act levying an income tax, unproductive property and all property whose net yield did not exceed four thousand dollars must be deducted from the real estate valuation. But even after such a deduction it was evident that the income from realty composed a vital part of the scheme for taxation embodied in the law. If the exempted property were struck out, and also the income from all invested personal property, bonds, stocks and investments of all kinds, it was "obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of taxation to be borne by professions, trades, employments or avocations, and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor."

The Court was unwilling to believe that such had been the intention of Congress. It did not mean to be understood as holding that an act, which by apportionment levied a direct tax on real estate and personal property, or the income of both, "might not also lay excise taxes on business, privileges, employments and vocations;" but the act of 1894 was not such an act "and the scheme must be considered as a whole." Therefore, the Court adhered to the opinion it had announced in the earlier case, that taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes. It now held, in addition, that taxes on personal property, or on the income of personal property, are direct taxes also, and that the tax imposed by the act of 1894,[1]

[1] Sections 27-37 inclusive.

so far as it fell on the income of real estate and of personal property, was a direct tax within the meaning of the Constitution; and because it was not apportioned according to representation was unconstitutional and void. From this opinion four of the justices dissented.[1]

The final decision of the Court greatly disappointed many who had long been demanding a graduated income tax.[2] These had complained that capital invested in franchises and corporations escaped paying its share of public taxation. The farming class and many of the smaller landowners throughout the country complained that too great a proportion of the burden of supporting the Government fell upon land. The decision in the income tax cases was made a political issue in the campaign of 1896. The Democrats attributed the cause of the subsequent deficit in the public revenues to the annulment by the Supreme Court of the income tax clauses in the Wilson-Gorman act. The party declared that this law had been passed by a Democratic Congress "in strict pursuance of the uniform decisions of that Court for nearly one hundred years,"[3] and that it was the duty of Congress to use all the constitutional power which remained after that decision, or which might come by its reversal by the Court, as the Court might thereafter be constituted, so that the burdens of taxation might be impartially laid and wealth bear its due proportions of expenses of the government. The Peoples Party, more explicit, pointedly demanded a graduated income tax in order that aggregated wealth should bear its just proportion of taxation, and denounced the recent

1 Justices Harlan, Brown, Jackson and White.

2 See National People's Party Platform, Omaha, July 2, 1892. Compare Democratic platform, Chicago, June 21, 1892; United Labor platform, Cincinnati, May 16, 1888; Greenback platform, Chicago, June 9-11, 1880.

3 Democratic platform, Chicago, July 8, 1896.

decision of the Court as "a misrepresentation of the Constitution and an invasion of the rightful powers of Congress over the subject of taxation."[1] The Republicans made no allusion to the decision in their platform, and the election of their candidates was interpreted by the party as a popular ratification of the Court's decision in the late income tax cases.[2]

[1] People's Party platform, St. Louis, July 24, 1894.

[2] The popular vote for William McKinley and Garrett H. Hobart, the Republican nominees, was 7,110,607; for William J. Bryan and Arthur Sewall, the Democratic and Populist candidates, 6,509,052.

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